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NO._____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DAVID T. FLAHERTY,
Petitioner,
v.

THOMAS S., by his guardian *ad litem*, JOYCE M. BROOKS, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian *ad litem*, CORNELIUS MANLY, on behalf of themselves and all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, MAY THE FEDERAL COURTS CONFER RETROACTIVE REMEDIAL RELIEF UPON A CLASS OF INSTITUTIONALIZED MENTALLY RETARDED PERSONS FOUND TO HAVE SUFFERED VIOLATION OF THEIR SUBSTANTIVE DUE PROCESS RIGHTS?

II. UNDER THE PRINCIPLES OF *YOUNGBERG V. ROMEO*, 457 U.S. 307 (1982), MAY THE FEDERAL COURTS CONFER AN ONGOING SUBSTANTIVE DUE PROCESS RIGHT TO TREATMENT TO FORMERLY INSTITUTIONALIZED MENTALLY RETARDED PERSONS DESPITE THEIR RELEASE FROM STATE CUSTODY?

III. UNDER THE PRINCIPLES OF *YOUNGBERG V. ROMEO*, 457 U.S. 307 (1982), MAY THE FEDERAL COURTS, HAVING FOUND THAT A CLASS OF INSTITUTIONALIZED MENTALLY RETARDED PERSONS HAS SUFFERED VIOLATION OF SUBSTANTIVE DUE PROCESS RIGHTS, CREATE A PRESUMPTION THAT THE APPROPRIATE REMEDY SHALL BE COMMUNITY PLACEMENT, AND BASE RELIEF ON THE RECOMMENDATIONS OF INDEPENDENT EXPERTS RATHER THAN THOSE OF TREATING PROFESSIONALS?

IV. IN APPLYING THE PROFESSIONAL JUDGMENT STANDARD UNDER THE PRINCIPLES OF *YOUNGBERG V. ROMEO*, 457 U.S. 307 (1982), MAY THE FEDERAL COURTS DEFINE

ACCEPTED TREATMENT STANDARDS IN SOLE RELIANCE ON PLAINTIFFS' EXPERTS, WHILE DISMISSING THE OPINIONS OF PETITIONER'S TREATING PROFESSIONALS EXCEPT WHERE THOSE OPINIONS REPRESENT OPTIMAL TREATMENT GOALS?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of North Carolina, on behalf of David T. Flaherty, Secretary, North Carolina Department of Human Resources, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 2, 1990.

OPINIONS BELOW

The opinion and judgment of the court of appeals (Appendix A at App. 1A-13A) is reported at 902 F. 2d 250. The order of the court of appeals denying a Petition for Rehearing and Suggestion for Rehearing en banc (Appendix B at App. 14A-15A) is unreported, as is the court of appeals' order granting the Motion for Stay of Mandate. (Appendix C at App. 16A-17A). The findings of fact, conclusions of law, and order of the district court (Appendix D at App. 18A-79A) are reported at 699 F. Supp. 1178.

JURISDICTION

The opinion and judgment of the court of appeals (Appendix A at App. 1A-13A) was entered on May 2, 1990. A timely Petition for Rehearing and Suggestion for Rehearing en banc was denied on June 4, 1990 (Appendix B at App. 14A - 15A), and a Motion for Stay of Mandate was granted by the Fourth Circuit on June 15, 1990. (Appendix C at App. 16A-17A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> §1 -- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or subject of any Foreign State.

STATEMENT OF THE CASE

This action was initially filed in 1982 in the United States District Court for the Western District of North Carolina pursuant to 42 U.S.C. §1983 on behalf of Thomas S., a nineteen-year-old developmentally delayed and mentally ill resident of Gaston County. At that time plaintiff was a patient on Unit R at Broughton Hospital, a state psychiatric facility. Plaintiff sued the Secretary of the Department of Human Resources (hereinafter "Petitioner"), his guardian who was also a state employee, and local governmental officials, claiming that all defendants had violated his substantive and procedural due process rights under the Fourteenth Amendment as well as his rights under state law in failing to provide him with minimally adequate treatment in the least restrictive setting.

On March 22, 1984, four mentally retarded patients at various state psychiatric hospitals moved for intervention in this lawsuit as additional plaintiffs, with an Intervenors' Complaint being filed on March 6, 1987. All plaintiffs simultaneously moved for certification of a class of individuals similarly situated, which they defined as follows:

> ...a class of adults who are mentally retarded or who have been treated as mentally retarded and who are or will be inappropriately kept in public psychiatric institutions in North Carolina in conditions violative of their constitutional rights.

By his second amended complaint of April 16, 1984, plaintiff Thomas S. claimed that defendants had violated his due process rights and those of class members similarly situated and sought declaratory and injunctive relief, requiring defendants to provide plaintiff with placement in a group home and appropriate treatment. Further, plaintiff sought similar relief requiring Petitioner to provide class members with "individually appropriate habilitation" and to protect their rights to "appropriate placement, safety, freedom from undue restraint, social stigma, and unnecessary institutionalization."

On September 18, 1984, the district court allowed the motion for summary judgment by named plaintiff Thomas S. against Petitioner and defendant guardian. *Thomas S. v. Morrow*, 601 F. Supp. 1055 (W.D.N.C. 1984). Pursuant to a final judgment entered on December 7, 1984, the district court ordered these defendants to provide specific mental health and residential services in the community to plaintiff. At the same time, the court granted the motion to intervene and motion for class certification but stayed further litigation on these issues pending disposition of defendants' appeals from the final judgment in favor of plaintiff. On January 9, 1986, the Fourth Circuit affirmed the trial court's judgment as to the named plaintiff with slight modification, applying the principles of *Youngberg v. Romeo*, 457 U.S. 307 (1982), to the facts of this case. *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986).

The district court conducted a three-day evidentiary hearing concerning the rights of class members during March

and May, 1987. At the conclusion of the hearing, the court withheld its ruling and requested that the parties submit proposed findings of fact and conclusions of law. (App. 84A). On November 21, 1988, the district court issued its Findings of Facts and Conclusions of Law and Order concerning the rights of plaintiff-intervenors and class members. *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988). (App. 18A). The court concluded that Petitioner had violated the constitutional rights of many mentally retarded persons in the state hospitals to safe conditions of confinement, freedom from undue restraint and minimally adequate habilitation or treatment. It also found that Respondents had a right to freedom from "unnecessary confinement" (App. 63A) and to associate with non-institutionalized persons. (App. 70A). The court enjoined the Petitioner from treating Respondents in a manner violative of their constitutional rights. It ordered that Respondents be furnished with appropriate treatment as well as remedial treatment in light of past violations of their rights as found by independent experts.

Specifically, within 45 days from its order, the district court required Petitioner to identify every mentally retarded adult confined in a state hospital at any time since March, 1984, including those long discharged from the hospital, and to insure a system of identifying additional such individuals admitted to any state hospital in the future. Independent qualified mental retardation professionals not employed by the state must evaluate those identified and determine whether, in their opinion, these individuals are receiving constitutional treatment at the present time or are currently suffering the effects of injury caused by Petitioner's failure to provide such treatment in the past. The court also ordered the parties to confer on the identity of a special master who would be appointed by the court after a hearing to review nominees, and who would hear disputes

concerning the identity and treatment of Respondents and monitor compliance with the court's order.

The Petitioner moved on December 21, 1988 for a stay of the district court's order pending appeal. On April 24, 1989 the district court denied this motion. The Petitioner on May 9, 1989 moved the Fourth Circuit for a stay of the district court's order pending appeal, which was granted on May 31, 1989.

On May 2, 1990, the Fourth Circuit issued an opinion affirming the district court's order. *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir. 1990). The circuit court rejected Petitioner's arguments that the district court had violated the principles of *Youngberg v. Romeo*, 457 U.S. 307 (1982) by failing to defer to the judgment of treating professionals in determining whether the class had suffered violation of substantive due process rights; that the district court had erroneously defined the class too broadly by including in it persons no longer in state custody or control, on whom *Youngberg* confers no substantive due process right to treatment; that the district court had violated the Eleventh Amendment by awarding class members retroactive remedial relief; that the district court had abused its discretion in appointing a special master; and that the district court's findings of fact were clearly erroneous. Petitioner's timely Petition for Rehearing and Suggestion for Rehearing en banc was denied on June 4, 1990, (App. 14A). On June 15, 1990, the Fourth Circuit granted Petitioner's Motion for Stay of Mandate pending petition to this Court for writ of certiorari to the Fourth Circuit. (App. 16A).

REASONS FOR GRANTING THE WRIT

This case presents genuine constitutional issues of great importance to all states facing challenges to their systems of caring for institutionalized citizens. The Fourth Circuit has placed itself in direct and substantial conflict with other circuits

in its approach to defining and remedying injury under the principles fashioned by this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Moreover, that court has upheld a remedy which represents an unprecedented and unwarranted erosion of principles of Eleventh Amendment immunity. Because of the importance of this case to Petitioner and other states, and because of the need to resolve significant conflicts among the circuit courts, this Court should grant certiorari and reverse the Fourth Circuit in full.

In *Youngberg* this Court first considered the substantive rights under the Fourteenth Amendment of a mentally retarded individual involuntarily committed to a state institution. The Court held that, while a state has no general constitutional duty to provide substantive services to its citizens, when a mentally retarded person is institutionalized and wholly dependent upon the state, he is entitled during that confinement to reasonable conditions of safety, freedom from unreasonable physical restraints, and such minimally adequate treatment "as may be reasonable in light of [his] liberty interests in safety and freedom from unreasonable restraints." 457 U.S. at 322. In determining what treatment is reasonable, the Court held that decisions made by a treating professional must be presumed valid, and liability may be imposed only upon a finding that the decision by the professional is a substantial departure from accepted professional judgment. Id. at 322-23.

In this case the district court ruled that Petitioner had violated Respondents' due process rights to minimally adequate treatment while they were restrained in state psychiatric facilities. The court ordered Petitioner to identify every mentally retarded adult confined in a psychiatric institution at any time since March 22, 1984. Each class member so identified is then to be evaluated at state expense by independent professionals to determine whether he is currently receiving minimally ade-

quate treatment or whether he has suffered injury as a result of constitutionally inadequate treatment in the past. Petitioner will be required to provide "appropriate" treatment to anyone not receiving treatment meeting the constitutional standards set out in the order, and will be required to furnish any treatment "necessary to remedy the harm caused by his violation of class members' constitutional rights." (App. 77A, ¶16). The court made no distinction, in terms of treatment rights, between class members still retained in Petitioner's custody and those released from state institutions, although the overwhelming majority of class members are no longer in state custody and thus are no longer subjected to alleged unconstitutional conditions.[1]

I. THE RELIEF UPHELD BY THE FOURTH CIRCUIT VIOLATES THE ELEVENTH AMENDMENT BY AWARDING RETROACTIVE REMEDIAL RELIEF FOR PAST INJURIES.

The Fourth Circuit decision allows an award of remedial relief aimed at compensating past injuries suffered by Respondents, in derogation of important guaranties of Eleventh Amendment immunity. Augmentation of services under the district court's order to that group which is presently confined would constitute prospective injunctive relief permissible under *Ex parte Young*, 209 U.S. 123 (1908), in which this Court held that the Eleventh Amendment does not proscribe an award of

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1 At entry of the district court order, only 450 of approximately 1320 class members remained in state custody. (App. 82A, ¶14). Such is the case because most such mentally retarded persons, committed because of accompanying mental illness or behavior disorder rendering them dangerous, are stabilized and appropriately discharged within a few weeks. (App. 82A, ¶14).

prospective injunctive relief in federal suits against state officers, even where such relief requires expenditure of public funds. However, relief awarded Respondents for injuries caused by past treatment goes beyond *Ex parte Young* and violates the holding in *Edelman v. Jordan*, 415 U.S. 651 (1974), that the federal courts may not impose against a state retroactive relief aimed at compensating past violations of the law. The process of evaluating class members to determine harm will in itself cost the state over a million dollars (App. 82A, ¶14) before remedial services can even begin. Thus, even if no class members are determined to have been injured by past treatment, the state will be grievously harmed by implementation of the district court's order. Therefore, the Fourth Circuit's opinion clearly violates the Eleventh Amendment.

The Fourth Circuit attempted to gloss over this violation by reasoning that because the district court decree addresses the "present needs" of Respondents, and would not require relief for class members presently unaffected by past unconstitutional practices, it constitutes only prospective relief. (App. 10A). This rather disingenuous interpretation of Eleventh Amendment doctrine, justified by the Fourth Circuit by its passing reference to *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"), represents a significant erosion of guaranties of state sovereignty contrary to the dictates of this Court, which has carefully preserved the "prospective-retrospective" distinction in *Edelman* and subsequent cases. *See, e.g., Green v. Mansour*, 474 U.S. 64 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102-03 (1984); *Quern v. Jordan*, 440 U.S. 332, 337 (1979). See also *Will v. Michigan Department of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed 2d 45 (1989) (except to the extent that prospective injunctive relief is sought, federal courts have no jurisdiction over state officer sued in official capacity under 42 U.S.C. § 1983).

Edelman counsels that the Eleventh Amendment forbids "payment of State funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation" to remedy harm caused by past violations of federal law. 415 U.S. at 675. To allow relief to be awarded as "prospective" where it addresses the continuing effects of past unconstitutional injury will in practical terms overrule *Edelman*. One can imagine few, if any, unconstitutional wrongs which would not produce lingering effects. Moreover, in relying on *Milliken II* the Fourth Circuit seriously misconstrues that case. There this Court approved remedial relief aimed at fostering systemic changes in the formerly segregated Detroit schools. The Court did not approve remedies designed to compensate former students of that school system.

The Fourth Circuit also reasoned that the district court had not violated the Eleventh Amendment because it had not awarded Respondents outright money damages. Thus, under the court's view, forcing the state to issue a check for a sum certain for past injury would violate the Eleventh Amendment, while requiring the state to sign a blank check would not. Such an analysis is wholly illogical and directly conflicts with the rejection of compensatory services under the Eleventh Amendment by the Eighth Circuit in *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982), and by the Ninth Circuit in *Alexopulos v. Riles*, 784 F.2d 1408 (9th Cir. 1986).

In *Miener* a learning-disabled child sought compensatory educational services to overcome the effects of past denial of such services, to which she had been entitled under the Education for All Handicapped Children Act, 20 U.S.C. § 1411. The Eighth Circuit rejected her argument that the relief would be prospective and equitable in nature and would not violate the Eleventh Amendment. The court held that such services would

be "practically indistinguishable" from a request for monetary reimbursement and would fail the *Edelman* litmus test of whether such relief would '"ensure **compliance in the future** with a substantive federal question determination.'" 673 F.2d at 982 (citation omitted). In *Alexopulos v. Riles*, 784 F.2d 1408 (9th Cir. 1986), the Ninth Circuit, citing *Miener* as support, rejected the award of compensatory educational services to a retarded man who had become ineligible due to his age for such services but argued for continuing entitlement as compensation for an earlier period in which they had been wrongly denied him. 784 F.2d at 1413. These cases reflect a view of the Eleventh Amendment by the Eighth and Ninth Circuits which is entirely consistent with this Court's analysis in *Edelman*, but which is in marked contrast to the Fourth Circuit's interpretation. This Court should therefore grant certiorari and correct the Fourth Circuit's misapprehension and misapplication of Eleventh Amendment principles.

II. THE FOURTH CIRCUIT UPHELD AN UNWARRANTED EXPANSION OF SUBSTANTIVE DUE PROCESS RIGHTS IN APPROVING THE GRANT OF A CONTINUED RIGHT TO TREATMENT UNDER *YOUNGBERG V. ROMEO*, 457 U.S. 307 (1982), TO PERSONS NO LONGER IN STATE CUSTODY.

The Fourth Circuit upheld not only the order that Petitioner provide former patients with remedial compensation for past injury, but also the order granting to those persons a present substantive due process right to treatment. Specifically, the court held that "the state's duty to render the kind of treatment prescribed by *Youngberg* is not discharged by simply releasing a class member from the institution...." (App. 9A). This conclusion finds no basis in *Youngberg*, is plainly contradicted by *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), and

places the Fourth Circuit in direct conflict with at least one other circuit.

In *Youngberg* the Court recognized that by taking a mentally retarded person into its custody, the State assumed a duty to provide him with reasonable conditions of safety and freedom from undue bodily restraint, and with such treatment as would ensure these conditions. These duties, however, arise solely by virtue of the resident's confinement and deprivation of liberty by state officials. 452 U.S. at 317. More recently, in *DeShaney v. Winnebago County* the Court reiterated that due process imposes on a state the duty to provide for a citizen's safety and well-being only when the state takes him into its custody and holds him there against his will. 489 U.S. at ____, 103 L. Ed. 2d at 261. *DeShaney* emphasizes what the Fourth Circuit chose to ignore, that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." Id. at 489 U.S. ____, 103 L. Ed. 2d 262-63.[2]

In direct conflict with the Fourth Circuit's decision, the Third Circuit Court of Appeals recently held that *DeShaney* forecloses any state obligation to provide care and treatment to mentally retarded persons living at home. *Philadelphia Police & Fire Ass'n. v. City of Philadelphia*, 874 F.2d 156, 168 (3rd Cir. 1989). There the district court had found that a reduction by Philadelphia and the Commonwealth of Pennsylvania in

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2 As the Fourth Circuit recognized, there is no evidence that this issue arises because the Petitioner has engaged in "dumping" class members from state institutions. Nor could he do so without flouting North Carolina commitment laws as well as the contempt powers of the federal court. The fact is that the majority of class members have been discharged because they no longer meet the criteria for commitment. (App. 82A, ¶14). See N.C. Gen. Stat. §122C-277.

services to a class of mentally retarded citizens living with their families violated the class' Fourteenth Amendment substantive due process rights. The Third Circuit reversed, reasoning that because *DeShaney* makes it clear that a state's affirmative act of restraining an individual's freedom to act on his own behalf is prerequisite to the state's obligation to provide care, it was impossible to find an affirmative state duty to protect the mentally retarded living in the community. 874 F.2d. at 167-68. See also *Hanson v. Clarke Co., Iowa*, 867 F.2d. 1115, 1120 (8th Cir. 1989) (*Youngberg* recognition of state duty to provide conditions of safety and freedom from undue restraint cannot be extended to **voluntarily** institutionalized persons).

The Fourth Circuit's holding on this issue should be corrected by this Court, not only to resolve the conflict between the Fourth and Third Circuits but also because the relief upheld by the Fourth Circuit is absolutely antithetical to this Court's holding in *Youngberg*. Therefore, this Court should grant the writ of certiorari.

III. THE FOURTH CIRCUIT VIOLATED THE PRINCIPLES OF *YOUNGBERG V. ROMEO*, 457 U.S. 307 (1982), IN UPHOLDING A PRESUMPTION THAT THE APPROPRIATE REMEDY WILL BE COMMUNITY PLACEMENT, AND IN ALLOWING RELIEF TO BE BASED ON THE RECOMMENDATIONS OF INDEPENDENT EXPERTS RATHER THAN TREATING PROFESSIONALS.

In *Youngberg* this Court held that in determining what constitutes reasonable training for institutionalized mentally retarded persons, courts must show deference to the judgment exercised by a qualified professional. 457 U.S. at 322. On the basis of this language, the Fourth Circuit upheld community

placement for the named plaintiff in this action, inasmuch as treatment recommendations that he be placed in a residential, community-based setting for treatment had been ignored. *Thomas S. v. Morrow*, 781 F.2d 367, 375-76 (4th Cir.), *cert. denied*, 476 U.S. 1124 (1986). In marked contrast even to that holding, which Petitioner continues to believe was wrongly decided, and in direct conflict with at least six other circuit courts, the Fourth Circuit has now upheld a mechanism for relief which will virtually assure a right to community placement to all class members regardless of the recommendations of treating professionals.

The overwhelming consensus among the circuit courts which have addressed the issue is that *Youngberg* grants the institutionalized mentally retarded no substantive due process right to residential community treatment. *See, e.g., S.H. and P.F. v. Edwards*, 860 F.2d 1045 (11th Cir. 1988); *Lelsz v. Kavanagh*, 807 F.2d 1243, 1251 (5th Cir.), *reh. denied*, 815 F.2d 1034 (5th Cir.), *cert. dismissed*, 483 U.S. 1057 (1987); *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239 (2nd Cir. 1984); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983); *Johnson v. Brelje*, 701 F.2d 1201, 1208-10 (7th Cir. 1983); *Hanson v. Clarke Co., Iowa*, 867 F.2d 1115 (8th Cir. 1989); *Rennie v. Klein*, 720 F.2d 266 (3rd Cir. 1983). Here, the Fourth Circuit purported to concur with that consensus but approved a

process in which each class member will be evaluated by independent professionals to determine what treatment should be ordered for him.[3] (App. 7A). These evaluations must determine whether current treatment of Respondents meets constitutional standards defined by the district court (App. 77A), which include a right to "normal" training settings (App. 71A), freedom from prolonged isolation from one's normal community (App. 76A), and a liberty interest in not being subjected to long periods of hospitalization (App. 76A). Thus, a clear presumption has been created in favor of recommending community treatment.

Moreover, the court's order that such recommendations be made by outside experts rather than by Petitioner's treating professionals constitutes an overt violation of *Youngberg* through which the presumption of correctness of treating professional recommendations is totally obliterated. It is true, as the Fourth Circuit noted (App. 4A), that the district court found that some treating professionals' decisions did not meet accepted professional standards and thus were not entitled to a presumption of correctness. (See Argument IV, *infra*). However, neither that finding nor the finding that some treating professional recommendations were not carried out justify appointment of outside experts to determine remedy. Instead, having detected and set forth constitutional violations, the

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3 In concluding elsewhere in its opinion that Respondents continue to possess treatment rights under *Youngberg* after release from Petitioner's custody (App. 9A), the Fourth Circuit guarantees community treatment for the majority of the class, despite its holding that the district court did not order outright community placement. Given the scope of treatment rights defined by the district court, it is impossible to imagine that the evaluators will recommend treatment anywhere but in the community for those already there.

district court should simply have ordered that unconstitutional practices be corrected -- through amendment of treating professional recommendations which did not meet accepted standards and through implementation of recommendations which did.

Among the circuits, the clearest contrast to the Fourth Circuit's approach may be found in the Fifth Circuit's opinion in *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir.), *reh. denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987). In *Lelsz*, individual service plans had been prepared for 279 class members by an interdisciplinary team of experts selected pursuant to a settlement agreement. According to those experts, class members would best be served by transfer to community facilities. The district court found that the State was unnecessarily delaying community placement and ordered transfer of the 279 patients to the community. Despite the findings by the interdisciplinary team, the Fifth Circuit held that the district court had no authority under *Youngberg* to order community placement. *Id.* at 1250-1251. The real issue, the Fifth Circuit noted, was not what optimum individual plans were recommended, but rather "whether the existing level of habilitation represents a gross and unwarranted departure from the minimum standard necessary to preserve an individual's safety and freedom from physical restraint." *Id.* at 1251. The court further found that allowing the individual plans to become coextensive with federal requirements would undermine *Youngberg's* emphasis on the judgment of the State's professionals. Consequently, the "constitutional standard in that instance would be determined by the views of expert witnesses, and outside consultants could effectively overrule state programs, contrary to *Youngberg*." *Id.* Thus, the Fifth Circuit has expressly rejected exactly the mechanism for relief upheld by the Fourth Circuit herein. *See also, Society for Good Will to Retarded Children v. Cuomo*, 737 F.

2d 1239 (2d Cir. 1984) (no entitlement to placement in least restrictive environment under the federal Constitution).

Because the remedy awarded Respondents herein and approved by the Fourth Circuit violates principles of federal law defined by this Court and directly and substantially conflicts with the holdings of other circuits, this Court should grant certiorari.

IV. THE FOURTH CIRCUIT VIOLATED THE PROFESSIONAL JUDGMENT STANDARD ADOPTED IN *YOUNGBERG v. ROMEO*, 457 U.S. 307 (1982), BY ACCEPTING THE DISTRICT COURT'S DEFINITION OF ACCEPTABLE PROFESSIONAL JUDGMENT BASED ON OPINIONS OF RESPONDENTS' EXPERTS AND ITS ELEVATION OF OPTIMAL TREATMENT GOALS TO THE LEVEL OF CONSTITUTIONAL MANDATE.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court held that, in addition to conditions of reasonable safety and freedom from undue restraint, an institutionalized mentally retarded person is entitled to "such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints." *Id.* at 324. The Court held that in considering whether such rights have been violated, reviewing courts must consider the treatment decisions made by an appropriate professional to be presumptively valid. This presumption was held to be "necessary to enable institutions of this type -- often, unfortunately, overcrowded and understaffed -- to continue to function." *Id.* In dicta, the Court noted that the plaintiff's expert testimony should have been admitted at trial because it may have been "relevant to whether [the treating professionals'] decisions were a substantial departure from professional judgment." *Id.* at 323, n. 31.

The Fourth Circuit used this dicta as a vehicle for approving an effective abandonment of the professional judgment standard in the instant case. The Fourth Circuit held that the district court had presumed the decision of Petitioner's treating professionals to be valid, and had not weighed their decisions against the testimony of Respondents' experts to decide which of several acceptable standards should apply. (App. 4A).[4] Instead, the Fourth Circuit held, the district court had found that treating professionals' decisions did not meet acceptable professional standards. To reach this result, however, the Fourth Circuit disregarded the fact that the district court used the testimony of outside experts to define accepted professional standards. Of the twenty-six discrete examples of accepted professional standards identified by the district court (App. 29A - 53A), only six standards were **not** defined in reliance upon plaintiff's experts, notwithstanding the district

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4 At the close of the trial, the district court requested proposed findings of fact and conclusions of law from each party without indicating how it would rule. (App. 84A). Eighteen months later the court issued Findings of Fact and Conclusions of Law and an Order which were nearly a verbatim replica of Respondents' submissions. In the district court's findings and conclusions, only the first ten paragraphs of the introductory "History of Proceedings," which included no factual findings, were original to the court. (App. 22A-25A). The rest of the lengthy decision was the Respondents' product without substantive changes. Petitioner was not provided an opportunity to object to or comment on these extensive findings and conclusions prior to their adoption by the court.

In rejecting Petitioner's contention that the fact-finding process was flawed and the findings themselves were clearly erroneous, the Fourth Circuit cited the district court's statement, made in denying Petitioner's Motion to Stay, that it had "spent many hours checking

court's claim that it "relied heavily" on the reports and recommendations of the Petitioner's professionals to determine "accepted professional judgment." (App. 26A). Obviously, where plaintiffs' experts are allowed to define absolute standards against which the treatment professionals' decisions are to be measured, it is a foregone conclusion that constitutional violations will be detected.

Other circuits, in accordance with the Court's mandate in *Youngberg*, have been less willing to elevate plaintiffs' outside experts to the status of framers of constitutional standards. Thus, in *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1985), the Second Circuit reversed the district court's holding that the professional judgment standard was violated where experts at trial disagreed with the care or treatment decisions actually made, or thought another course of treatment would have been better. The issue, the circuit court held, was not whether optimal treatment recommended by outside experts was afforded, but rather whether professional judgment in fact was exercised. In *Lelsz v. Kavanagh*, 807 F.2d 1243, 1251 (5th Cir.), *reh. denied*, 815 F.2d 1034 (5th Cir.), *cert. dismissed*, 483 U.S. 1057 (1987), the Fifth Circuit disapproved allowing expert consultants' recommendations to define minimally adequate treatment, observing that the "constitutional standard in that instance would be deter-

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(Footnote 4 continued)
and editing plaintiffs' proposal to insure that the final draft of the opinion was faithful to the evidence as a whole." (App. 12A). Unfortunately, this assertion is not borne out by the opinion itself, which, as Peititioner argued below, is replete with inacccurate citations to the record and is so nearly identical to Respondents' submission that it is impossible that any actual editing could have occurred.

mined by the views of expert witnesses, and outside consultants could effectively overrule state programs . . .." More recently, the Second Circuit has again addressed this issue, in a further appeal in *Society for Goodwill to Retarded Citizens v. Cuomo*, 902 F.2d 1085 (2d Cir. 1990). There, after finding that the district court had "misused expert testimony by treating it as evidence of alternative choices against which the institution's treatment should be compared," the Second Circuit held that "[e]xpert reports and testimony should be used only to establish the general parameters of acceptable, constitutional activity, and not whether the exercised professional judgment was indisputably correct and unassailable -- or for that matter even a better approach to the problem." *Id.* at 1090.

The Second Circuit's conclusion that plaintiffs' experts may be used to establish parameters of constitutional activity must be considered along with the fact that the due process treatment right recognized by the Court in *Youngberg* was not a right to treatment designed to lead to independent living, acquisition of self-care skills, educational opportunities or employment. While these goals may be laudable and desirable, the Court held that the constitutional minimum to which, in this context, standards of professional practice must be tied is such

training as is reasonably necessary to effectuate safety and freedom from undue bodily restraint.[5] *Youngberg* at 457 U.S. 324. Where, as in this case, courts allow plaintiffs' experts to define the accepted standards more broadly, the predictable outcome will be that judges will choose between all sorts of acceptable treatment options, many of which far exceed the constitutional predicate on which claims brought under *Youngberg* are based.

On the basis of *Lelsz* and both *Society for Goodwill* opinions, the State of North Carolina was entitled to judgment in its favor where the record reveals that but for a few isolated instances, appropriate professionals were making treatment decisions for Respondents and that treatment comported with *Youngberg*'s requirement of safety, freedom from undue restraint and minimally adequate treatment necessary to ensure safety and freedom from restraint. Respondents should have

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5 The Fourth Circuit implicitly adopted the much broader standard of duty set out by the district court (App. 64A), which posits that class members have a right to such training as is reasonably necessary to prevent their pre-existing self-care skills from deteriorating as a result of their commitment. This standard, traceable to Justice Blackmun's concurrence in *Youngberg*, has been expressly adopted by the Second Circuit. *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1250 (2d Cir. 1984). Even should the Blackmun standard be deemed appropriate, the method of definition of accepted professional practices upheld herein would still subvert the professional judgment standard.

prevailed only upon a showing, for the majority of class members, either that decisions by treating professionals did not meet the constitutional standards set out above or that decisions representing minimally adequate rather than optimal treatment were not carried out. See, e.g., *Lelsz* at 807 F.2d 1249-50, n. 9. Instead the Fourth Circuit has approved an approach by which treating professionals will be held to an optimal standard of care that in state institutions can rarely, if ever, be met.

Moreover, the Fourth Circuit approved an unfair and uneven application of the professional judgment standard. Thus, the Fourth Circuit ignored Petitioner's showing that the district court had improperly ruled that treating professionals who were psychiatrists, and who testified that professional judgment was being exercised on behalf of class members, were not mental retardation professionals.[6] Conversely, where treatment professionals' expressions of optimal long-term treatment goals, such as community placement, had not been reached, the Fourth Circuit upheld the finding of due process violations. The court thus redefined this Court's definition of minimally adequate treatment in *Youngberg* to mean state-of-the-art treatment, with no regard for the limitation of public resources. Clearly, this Court recognized in *Youngberg* that some latitude must be afforded the decisions of institutional management faced with difficult choices made in the near-constant shadow of limited resources. *See, Youngberg* at 457 U.S. 322, n. 29. The

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6 In this regard the district court's ruling absolutely cannot be squared with *Youngberg*, where the Court's definition of professional decision maker, 457 U.S. 323, n. 30, clearly includes persons trained in medicine, especially those who, like the professionals rejected herein, have long experience in treating the mentally retarded. Thus, the Fourth Circuit's silence on this aspect of Petitioner's argument to that court is not surprising.

Fourth Circuit afforded Petitioner no such deference. In conflict with that court, several circuits have held that the decision to treat persons such as the Respondents in institutions does not violate constitutional standards under *Youngberg*. *See Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983); *Phillips v. Thompson*, 715 F.2d 365, 368 (7th Cir. 1983); *S.H. & P.F. v. Edwards*, 860 F.2d 1045 (11th Cir. 1988); *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1985); 902 F.2d 1085 (2d Cir. 1990); *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir.), *reh. denied*, 815 F.2d 1034 (5th Cir.), *cert. dismissed*, 483 U.S. 1057 (1987). Because the Fourth Circuit's application of the professional judgment standard so squarely conflicts with decisions of other circuits, this Court should grant certiorari and resolve the confusion among the circuit courts concerning this important issue.

CONCLUSION

For the reasons set out above, it is respectfully suggested that the petition for writ of certiorari should be granted.

This the 29th day of August, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT upon the following parties to this action by depositing a copy of the same in the United States Mail at Raleigh, North Carolina, first class postage prepaid, and addressed as follows:

Roger Manus
Deborah Greenblatt
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Carolina Legal Assistance
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Edward G. Connette
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1001 Elizabeth Avenue, Suite 1-D
Charlotte, North Carolina 28204

This the 29th day of August, 1990.

David M. Parker
Special Deputy Attorney General

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DAVID T. FLAHERTY,
Petitioner,
v.

THOMAS S., by his guardian *ad litem*, JOYCE M. BROOKS, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian *ad litem*, CORNELIUS MANLY, on behalf of themselves and all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 89-1006

THOMAS S., by his guardian ad litem, Joyce M. BROOKS; JEANETTE H.; TODD C.; PHILLIP B.; MARGARET R., by her guardian ad litem, Cornelius Manly, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

versus

DAVID T. FLAHERTY, SECRETARY, North Carolina Department of Human Resources,

Defendant - Appellant,

and

ALLEN CHILDRESS, guardian for the plaintiff; BENJAMIN CARPENTER, Director of the County Department of Social Services; JAMES MELTON, Director of Gaston-Lincoln Area Mental Health Program; GASTON COUNTY COMMISSIONERS, to wit: Harley B. Gaston, Jr., David Beam, David Hollifield, James Forrester, Dean Carpenter, Robert Heavner, Porter McAteet,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, Senior District Judge. (CA-82-418-C-C-M)

Argued: December 5, 1989 **Decided: May 2, 1990**

Before HALL, Circuit Judge, BUTZNER, Senior Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Senior Judge Butzner wrote the opinion in which Judge Hall and Judge Williams concurred.

ARGUED: Wilson Hayman, Assistant Attorney General, David McLean Parker, Assistant Attorney General, Raleigh, North Carolina, for Appellant. Roger Todd Manus, Raleigh, North Carolina, for Appellees. **ON BRIEF**: Lacy H. Thornburg, Attorney General, Reginald L. Watkins, Special Deputy Attorney General, Raleigh, North Carolina, for Appellant. Deborah Greenblatt, CAROLINA LEGAL ASSISTANCE INCORPORATED, Raleigh, North Carolina; Edward G. Connette, III, GILLESPIE, LESESNE & CONNETTE, Charlotte, North Carolina; Theodore O. Fillette, LEGAL SERVICES OF SOUTHERN PIEDMENT, INC., Charlotte, North Carolina, for Appellees.

BUTZNER, Senior Circuit Judge:

This case is the class action phase of litigation about the constitutional rights of mentally retarded patients in public psychiatric hospitals in North Carolina. In *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986) (*Thomas II*), this court affirmed the district court's grant of summary judgment for the named plaintiff Thomas S. against the Secretary of the North Carolina Department of Human Resources. *Thomas S. v. Morrow*, 601 F. Supp. 1055 (W.D.N.C. 1984) (*Thomas I*). In this, the second phase of the litigation, the district court certified a class of patients similarly situated to Thomas S. After a bench trial, the court issued detailed findings of fact and conclusions of law and ordered injunctive relief for the class members. *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988) (*Thomas III*). The Secretary appeals the district court's judgment. We affirm.

The district court described the history of the proceedings and the facts in detail. *Thomas III*, 699 F. Supp. at 1181-99. It is not necessary to reiterate the court's findings and conclusions other than to say they dealt with the deficient care of mentally retarded persons in North Carolina's psychiatric hospitals. We proceed to address the Secretary's arguments on appeal.

I

The Secretary first contends that the district court did not follow the principles of *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Thomas II*, 781 F.2d 367. Specifically, he asserts that the court did not defer to the judgment of treating professionals.

The Supreme Court in *Youngberg* held that a mentally retarded individual in state custody "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." 457 U.S. at 324. To determine whether an individual's rights have been violated, courts must show deference to the decisions of professionals:

> [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

457 U.S. at 323 (footnote omitted).

The purpose of this standard is to prevent a judge or jury from using "unguided discretion" to balance the individual's liberty interests against the state interest in restraining liberty. 457 U.S. at 321. Deference to professionals ensures that federal courts do not unnecessarily interfere with the internal operations of state institutions. 457 U.S. at 322.

The decisions of the treating professionals are not conclusive, however. Although the question of admissibility of expert testimony offered by the mentally retarded plaintiff was not appealed to the Supreme Court in *Youngberg*, the Court noted that this expert testimony may have been relevant to whether the treating professionals' decisions substantially departed from accepted standards. 457 U.S. at 323 n.31.

Here, the district court avoided the danger that the *Youngberg* standard was designed to prevent. It did not weigh the decisions of the treating professionals against the testimony of the class members' professionals to decide which of several acceptable standards should apply. Rather, as *Youngberg* requires, it presumed that the decisions of the treating professionals were valid. However, it found that many of the decisions of the treating professionals had not been implemented. This was also the situation in *Thomas II*, 781 F.2d at 374-76.

The court also found areas in which the decisions of the treating professionals substantially departed from accepted standards. Specifically, the court found the Secretary's decisions "to confine mentally retarded persons with no diagnosis of mental illness in state psychiatric hospitals," "to place mentally retarded persons on general psychiatric wards," "to seclude and mechanically restrain the plaintiffs without employing behavioral treatment programs," "to administer antipsychotic drugs at the levels and under the conditions found to exist in the state psychiatric hospitals," and "to ignore the community placement recommendations of the state's treating professionals" substantially departed from accepted professional standards. 699 F. Supp. at 1201-02. The court identified the accepted professional standards regarding drug use, restraint, and habilitation based on the Secretary's written policies and the testimony of the plaintiffs' and defendant's experts. There is ample evidence supporting the court's finding that the Secretary substantially departed from these identified standards.

The Secretary contends that the district court erred in rejecting the significance of the accreditation of the four state hospitals by the Joint Committee on Accreditation of Hospitals

(JCAH) and the certification of the R Unit at Broughton Hospital by the Health Care Financing Administration as an intermediate care facility for mentally retarded patients.

This argument does not withstand analysis. Relevant accreditation is prima facie evidence of constitutionally adequate conditions. *See Woe v. Cuomo*, 729 F.2d 96, 106-07 (2d Cir. 1984). The record, however, supports the court's conclusion that this presumption was rebutted by evidence of serious deficiencies found by the accreditation team. During a survey by JCAH personnel while this action was pending, their report disclosed the following deficiencies in Broughton Hospital, which is generally regarded to be superior to other state institutions:

> (1) Minimal participation of patients and their guardians in treatment planning.
>
> (2) Insufficient professional and support staff to supervise and implement the treatment plan or provide adult educational services.
>
> (3) Inadequate or non-existent emotional, behavioral, activities, legal and vocational assessments.
>
> (4) Inadequate treatment plans and inadequate documentation of their implementation.
>
> (5) Use of special treatment procedures that are not justified in light of the harm they are known to cause.
>
> (6) The use of seclusion and restraint where written justification is inadequate or non-existent and where less intrusive methods were not considered.
>
> (7) Failure of the hospital administration to monitor the unwarranted use of seclusion and restraint.

(8) Failure of staff to note clients' response to activity services.

(9) Failure to monitor and evaluate the quality and appropriateness of activity services.

(10) Failure to provide adequate education services.

(11) Violation of life safety standards.

699 F. Supp. at 1197. Other conditions in Broughton noted by a team of federal officials, while this suit was pending, dealt with deficiencies with respect to minimum standards for Medicaid intermediate care of mentally retarded patients:

(1) "[I]nconsistent supervision in the delivery of individualized plans of care for residents, specifically as to areas of health, hygiene, grooming and toilet training."

(2) No evidence that the mental retardation professional "had assured that all recommendations were carried out."

(3) Deficits in staff training concerning developmental needs and other issues.

(4) Only custodial care in the living units.

(5) Lack of privacy at shower time.

(6) Lack of systematic training for residents to develop eating skills.

(7) Failure to document drug reviews in the clients' record or make the reviews available to professional staff.

(8) On ten of ten records reviewed, no evidence that the physical therapist had conducted an initial screening.

(9) That recreation equipment was not visible and in enough quantity to carry out the stated objectives of the activities program.

699 F. Supp. at 1198.

II

The Secretary argues that the court improperly found that the class members had a right to treatment in the least restrictive environment. He is concerned that the court improperly requires community placement for class members.

The court did not apply a least restrictive analysis. Rather, the court identified the class members' right to *minimally adequate* habilitation in a setting *minimally adequate* to reduce self-abuse and aggression. 699 F. Supp. 1205-06. The court ordered habilitation in "a training setting which approximates the more normal environment against which their increasing independence will be measured," "the development of individual plans for moving class members to more normal settings," and "the provision of alternative habilitation settings where professional recommendations can be carried out." 699 F. Supp. at 1204.

The court's order follows *Youngberg's* teaching that the "minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints." 457 U.S. at 322. We do not interpret the court's order to require community placement of all class members. The court has set up a process in which the needs of each class member will be evaluated by professionals on a case-by-case basis. The court can do no more than to articulate general standards to guide these evaluations. The professional evaluators may or may not find that the minimally adequate setting for habilitation for an individual class member is placement in the community. Such a finding would be consistent with dictum in *Parham v. J.R.*, 442 U.S. 584, 607

(1979), which recognized the necessity of a continuing need to review commitment to a mental institution. *Parham* dealt with the commitment of children, but there appears to be no reason why its principles should not be applied to persons whose incompetency results from mental retardation instead of age. *See Clark v. Cohen*, 794 F.2d 79, 86 (3d Cir. 1986); *Thomas II*, 781 F.2d at 374-76.

III

The Secretary also contends that the court defined the class too broadly to include mentally retarded adults who were released from psychiatric hospitals after the date of class certification, March 22, 1984. The Secretary takes the position that persons who are no longer in state custody have no substantive due process rights to minimally adequate treatment and thus should not be included in the order. The Secretary principally relies on *Youngberg*, *Thomas II*, and *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), for the proposition that the state has no duty to provide services to persons not under state control.

We held in *Thomas II* that a mentally retarded patient retained his constitutional rights under *Youngberg* after transfer from a state psychiatric hospital to an inappropriate detoxification center. We reasoned that his status as a legally incompetent adult who is a ward of a state-appointed guardian had not changed and he had no choice about his living arrangements. 781 F.2d at 374. Here, too, the order provides a remedy for retarded patients who were in a public psychiatric institution after March 22, 1984, but subsequently released from state control.

DeShaney, 109 S. Ct. 998, does not support the proposition that persons who were in state custody at the time of class certification and later released have no right to a remedy. There, the Supreme Court held that the due process clause does not require the state to protect a child who is not in state custody from harm caused by his father. The Court specifically distinguished *Youngberg* by pointing out that the state does have a duty to provide services when it restrains a person's liberty through institutionalization. *See* 109 S. Ct. at 1005-06. Here all members

of the class were institutionalized patients on the date of certification. The evidence discloses that in some instances treatment recommended by professionals, which would have satisfied the constitutional requirements explained in *Youngberg*, was either not implemented or implemented improperly resulting in harm to the patients. In other instances the treatment *Youngberg* contemplated was not even recommended. The district court sought to remedy the harm suffered by class members whether they remained in the institution or had been discharged. The object of the court's order is twofold: to ameliorate the lingering effects, if any, of improper treatment; and to remedy inappropriate community placements, if any, such as those described in *Thomas II*, 781 F.2d at 372-73, that were not anticipated by professionals in the institutions. We believe that the state's duty to render the kind of treatment prescribed by *Youngberg* is not discharged by simply releasing a class member from the institution where he or she had been hospitalized. Otherwise the state could unilaterally avoid the obligations imposed by *Youngberg* and *Thomas II* and defeat the claims of class members by terminating their institutional care while the case was pending. There is no evidence that state officials have acted with this improper motive, but surely the class members who were discharged after the class was certified are entitled to the consideration due those class members who remain in the institutions.

Furthermore, we note that the district court's definition of the class is only a practical starting point for identifying the persons needing help. If the class members have not been injured by constitutionally inadequate treatment in the past or are currently receiving minimally adequate treatment in appropriate placements, their present situation need not be disturbed. A special master will be available to hear disputes and make recommendations about the present condition of class members who have been discharged. The district court retains jurisdiction to modify its order.

IV

The Secretary argues that remedial treatment awarded to persons no longer in state custody is compensation for a past violation of law and thus falls into the category of retroactive relief forbidden by the Eleventh Amendment.

The district court's decree does not run afoul of the Eleventh Amendment. The court did not award monetary damages to any class member in contravention of the principles explained in *Edelman v. Jordan*, 415 U.S. 651 (1974). The court did not order injunctive relief simply to compensate for past violations of a patient's constitutional rights. Thus, if a patient had been previously subjected to unconstitutional conditions but presently was not affected by past unconstitutional practices, the Secretary was not required to provide remedial treatment.

The court's decree provides only prospective relief to class members who were in a hospital on the date the class was certified or who subsequently were admitted to a hospital. The decree addresses the present needs of the patients. Class members discharged from the hospitals while this action was pending are entitled, under the decree, to the constitutional protection delineated in *Youngberg* in accordance with the standards adopted by the Supreme Court. *See* 457 U.S. at 314-25. If the present conditions under which class members live do not meet constitutional requirements as explained in *Youngberg*, or if a patient is presently suffering from unconstitutional conditions imposed while in the hospital, the decree provides appropriate prospective relief. The decree fully comports with the remedy approved in *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986).

V

The Secretary argues that the appointment of a special master was an abuse of discretion. In his view, the district court erred by failing to specify the exceptional circumstances warranting a master. He contends that no exceptional circumstances are present.

Rule 53(b) of the Federal Rules of Civil Procedure states in pertinent part: "A reference to a master shall be the exception and not the rule....[I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

The court explicitly found that exceptional circumstances existed to warrant its appointment of a master. 699 F. Supp. at 1205. Although the court did not specify these circumstances, the exceptional circumstances are clear from the findings of fact and conclusions of law. The class is large, and each class member requires individualized consideration. The general responsibilities of the master are to hear and report on disputes about inclusion in the class and the adequacy of treatment to those in the class. 699 F. Supp. at 1207. The district court retains jurisdiction to modify the order as necessary. Other courts have appointed special masters in institutional reform cases such as this involving a large class of plaintiffs. *See, e.g., Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir. 1982), *amended in part on another issue on rehearing*, 688 F.2d 266 (5th Cir. 1982); *Gary W. v. Louisiana*, 601 F.2d 240, 245 (5th Cir. 1979).

The facts of *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), cited by the Secretary as support for the proposition that the district court abused its discretion in appointing a master, are quite different. There, the district court referred antitrust cases to a master before liability was determined because the cases were complex and would take too much time to try. 352 U.S. at 252-54. The Supreme Court stated that the reference to a master "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." 352 U.S. at 256. In contrast, the parties here have had a trial and a decision on the merits by the district court. We hold that the appointment of a special master for the remedial stage of this case was justified by exceptional circumstances for implementation of the court's decree.

VI

The Secretary's final argument is that the findings of facts adopted by the district court are clearly erroneous. He claims that numerous findings of fact have no basis in the record. He contends that the fact finding process was flawed because the court did not defer to professional judgment as required by *Youngberg*, 457 U.S. at 307. He argues that the court ignored substantial evidence rebutting the testimony of the class members' witnesses.

Initially, we reject the Secretary's suggestion that we apply a heightened standard of review because the district court adopted the class members' proposed findings of facts and conclusions of law. The court described the process it followed in reviewing the proposed findings as follows:

> In this case the court did not simply adopt plaintiffs' proposed findings verbatim. After trial, both sides submitted proposed findings of fact and conclusions of law. After reviewing the proposals and the entire record, the court tentatively concluded that plaintiffs should prevail and adopted plaintiffs' proposal as the first draft of an opinion. The court then spent many hours checking and editing plaintiffs' proposal to insure that the final draft of the opinion was faithful to the evidence as a whole.

App. 267. An argument similar to the Secretary's complaint was rejected by the Supreme Court in *Anderson v. Bessemer City*, 470 U.S. 564, 571-73 (1985).

We find that the record supports the district court's findings. Further, the court properly followed the standards of *Youngberg* in making its factual findings. Finally, we reject the Secretary's argument that the court ignored rebuttal evidence. The court listened to testimony and reviewed extensive documentary evidence and deposition testimony. It is the role

of the district court, not this court, to weigh the evidence and judge the credibility of the witnesses. *See* Fed. R. Civ. Pro. 52(a); *Anderson*, 470 U.S. at 573-76.

VII

In conclusion, we note that to be effective, the injunction must be implemented in a practical way by both parties in the remedial phase of the lawsuit. At oral argument, counsel for the parties indicated that before proceedings were stayed pending appeal they had constructive meetings about implementing the order. We encourage the parties to continue this progress toward resolving the details of the remedial phase in a manner that will be practical, efficient, and compassionate, having due regard for the authority of the Secretary to care for patients in accordance with accepted professional standards and the right of the patients to the protection that the Constitution affords them.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED June 4, 1990

No. 89-1006

THOMAS S., by his guardian ad litem, Joyce M. Brooks; JEANETTE H.; TODD C.; PHILLIP B.; MARGARET R., by her guardian ad litem, Cornelius Manly, on behalf of themselves and all others similarly situated

Plaintiffs - Appellees

v.

DAVID T. FLAHERTY, Secretary, North Carolina Department of Human Resources

Defendant - Appellant

and

ALLEN CHILDRESS, guardian for the plaintiff; BENJAMIN CARPENTER, Director of the County Department of Social Services; JAMES MELTON, Director of Gaston-Lincoln Area Mental Health Program; GASTON COUNTY COMMISSIONERS, to wit: Harley B. Gaston, Jr., David Beam, David Hollifield, James Forrester, Dean Carpenter, Robert Heavner, Porter McAteet

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Hall and Judge Williams.

For the Court,

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Filed: June 15, 1990

NO. 89-1006

THOMAS S., by his guardian ad litem, JOYCE M. BROOKS, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian ad litem, CORNELIUS MANLY, on behalf of themselves and all others similarly situated,

Plaintiffs,

DAVID T. FLAHERTY, Secretary, North Carolina Department of Human Resources,

Defendant-Appellant,

and

ALLEN CHILDRESS, guardian for the plaintiff; BENJAMIN CARPENTER, Director of the County Department of Social Services; JAMES MELTON, Director of Gaston-Lincoln Area Mental Health Program; GASTON COUNTY COMMISSIONERS, to wit: Harley B. Gaston, Jr., David Beam, David Hollifield, James Forrester, Dean Carpenter, Robert Heavner, Porter McAteet,

Defendants.

ORDER

Upon consideration of appellant's motion for stay of the mandate;

IT IS ORDERED that the motion is granted and the mandate of this Court which issued on June 11, 1990 is hereby recalled and stayed pending timely application to the United States Supreme Court for a writ of certiorari.

Entered at the direction of Senior Judge Butzner for a panel consisting of Judge Hall, Judge Butzner and Judge Williams, United States District Judge, sitting by designation.

For the Court

/s/ _____
JOHN M. GREACEN
CLERK

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-418-M

THOMAS S., by his Guardian *ad litem*, Joyce M. Brooks JEANETTE H., TODD C., . PHILLIP B. and MARGARET R., by her guardian *ad litem*, Cornelius Manly, on behalf of themselves and all others similarly situated, Plaintiffs,	
-vs	FINDINGS OF FACT AND CONCLUSIONS OF LAW
DAVID T. FLAHERTY,[1] Secretary, North Carolina Department of Human Resources, and ALLEN CHILDRESS, in his official capacity as guardian for plaintiff Thomas S., Defendants.	

Edward G. Connette, Gillespie, Lesesne & Connette, 1001 Elizabeth Avenue, Suite 1-D, Charlotte, North Carolina 28204; Roger Manus and Deborah Greenblatt, Carolina Legal Assistance, Post Office Box 2446, Raleigh, North Carolina 27602, counsel for plaintiffs.

1 David T. Flaherty succeeded Phillip J. Kirk as Secretary, North Carolina Department of Human Resources, on April 8, 1987, and is, therefore, being substituted as a party defendant pursuant to Fed.R.Civ.P. 25(d)(1).

Wilson Hayman, Assistant Attorney General, and Doris J. Holton, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for defendant Secretary of Human Resources.

Before James B. McMillan, District Judge
UNITED STATES DISTRICT JUDGE

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I. HISTORY OF PROCEEDINGS

Paul Caldwell, next friend of plaintiff Thomas S., filed this suit on July 7, 1982, seeking declaratory and injunctive relief under federal and state law. Also on July 7, 1982, Mr. Caldwell was appointed guardian *ad litem* for Thomas S. On July 10, 1984, Joyce M. Brooks was substituted as guardian *ad litem* for Thomas S.

Thomas S., a nineteen-year-old Gaston County resident when this action was filed, had been diagnosed as suffering from, *inter alia*, schizophrenia and borderline mental retardation, and was incapable of either living independently or managing his own affairs. Given up for adoption at birth, Thomas spent his first eighteen years in approximately forty different foster homes and institutions while in the custody of the Gaston County Department of Social Services ("DSS"). DSS shuffled Thomas through so many placements during his youth because there were no appropriate community-based treatment facilities available in Gaston County during this period.

Soon after Thomas' eighteenth birthday, DSS succeeded in having Thomas declared legally incompetent. In February, 1982, defendant Allen Childress, regional adult mental health specialist with the North Carolina Department of Human Resources, was appointed Thomas' guardian. Because Childress considered Thomas' then-current placement, a rest home for the elderly, inappropriate, Childress caused Thomas to be admitted to the "R" (mental retardation) unit at Broughton Hospital on March 15, 1982.

Four months after Thomas was institutionalized at Broughton, his next friend brought this suit against Sarah Morrow, then Secretary of the North Carolina Department of Human Resources ("Secretary"); Allen Childress, in his official capacity as Thomas' guardian ("guardian"); and the directors of two local agencies, DSS and the Gaston-Lincoln area mental health program. The Gaston County Commissioners later were joined as additional defendants.

The complaint alleged that the defendants had denied Thomas substantive due process accorded by the Fourteenth Amendment. It protested the defendants' failure to provide minimally adequate treatment, alleging that Thomas' hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment regarding his treatment. The complaint charged that the defendants had deprived Thomas of liberty interests created by state law, a procedural due process claim under the Fourteenth Amendment. The complaint also asserted various pendent state law claims. Thomas requested an injunction ordering the defendants to place him in an appropriate group home and to provide other treatment recommended by professionals who had examined and worked with him.

On May 26, 1983, the court entered a consent judgment permitting the two local agency defendants to contract with an independent nonprofit organization for foster care and treatment from the date of Thomas' discharge from Broughton until March 1, 1984. Because of the consent order, the court deferred all parties' motions for summary judgment and declared the case inactive until February 1, 1984.

On March 22, 1984, four individuals, Jeanette H., Todd C., Phillip B. and Margaret R., moved to intervene as plaintiffs. The court appointed Cornelius Manly as guardian *ad litem* for Ms. R. on May 4, 1984. Also on March 22, 1984, these individuals joined Thomas S. in a motion to certify a statewide class of similarly situated individuals pursuant to Fed.R.Civ.P. 23. The class is defined as:

> adults who are mentally retarded or who have been treated as mentally retarded and who are or will be inappropriately kept in public psychiatric institutions in North Carolina in conditions violative of their constitutional rights.

After reactivating the case, the court found that Thomas had been shifted to at least three additional placements since the consent judgment was filed. On August 15, 1984, the court heard arguments on all pending motions. The court ruled on the cross motions for summary judgment on September 18, 1984. *Thomas S. v. Morrow*, 601 F.Supp. 1055 (W.D.N.C. 1984). All pendent state law claims against state officials were dismissed, in accordance with *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The claims against the local officials also were dismissed without prejudice. Relying on *Youngberg v. Romeo*, 457 U.S. 307 (1983), the court granted summary judgment against the Secretary and the guardian on Thomas' substantive due process claim without reaching the procedural due process claim.

On December 7, 1984, the court entered a judgment requiring the Secretary and the guardian to develop a treatment plan and appoint a case manager for Thomas. The judgment directed them to furnish Thomas the treatment recommended by qualified professionals who had evaluated his needs. In accordance with the recommendations, the order specified that Thomas should be placed in a "stable suitable supervised community residential placement such as: (1) a non-institutionalized specialized adult foster care situation...or (2) a group home with adults of average intelligence." Adhering to the recommendations, the court also directed that Thomas should be provided non-residential services such as mental health counseling, adult basic education and vocational training, and "opportunities for community interaction." The Secretary and the guardian appealed.

Also on December 7, 1984, the court permitted the intervention of the four additional plaintiffs and certified the class pursuant to Fed.R.Civ.P. 23(b)(2), to be represented by Thomas S. and the intervenors. However, the court stayed further litigation on behalf of the intervening plaintiffs and class members pending the outcome of the appeals.

The court's judgment was unanimously affirmed with one technical modification by the Fourth Circuit Court of Appeals. *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986). Thereafter, the Secretary's petition for rehearing and rehearing en banc were

denied. Separate petitions for writs of *certiorari* by the Secretary and the guardian were similarly denied by the Supreme Court. 476 U.S. 1124 (1986); 107 S.Ct. 235 (1986).

Once the judgment in favor of Thomas S. was affirmed on appeal, the court vacated the stay, allowing litigation on behalf of the intervenors and the class to proceed. On May 28, 1986, Phillip J. Kirk, then Secretary of the Department of Human Resources, was substituted as a party defendant. On July 30, 1986, the court heard plaintiffs' motion for partial summary judgment on behalf of the class. On August 19, 1986, the court denied this motion without prejudice and ordered an evidentiary hearing.

The case was heard on March 5 and 6, 1987. Counsel for the Secretary requested and was granted leave to offer additional evidence. On May 5, 1987, the court heard additional evidence.

Plaintiffs claim that the confinement conditions imposed on class members in the state's psychiatric hospitals violate their constitutionally protected liberty interests under the due process clause of the Fourteenth Amendment. The Division of Mental Health, Mental Retardation and Substance Abuse Services ("MH/MR/SAS") operates within the Department of Human Resources. The state is divided into four regions, each of which serves the population in a designated area. Each region has a psychiatric hospital (Broughton Hospital in the Western region, John Umstead Hospital in the North Central region, Dorothea Dix Hospital in the South Central region and Cherry Hospital in the Eastern region), and a mental retardation center. The plaintiffs' claims do not involve the state's mental retardation centers. The plaintiffs seek declaratory and prospective injunctive relief against the Secretary in the form of constitutionally required treatment that is consistent with the recommendations of qualified treating professionals.

In deciding this case, the court has carefully considered all of the evidence bearing on each issue, and notes that there have been conflicts in the testimony concerning: what constitutes minimally adequate habilitation; what factors compromise class

members' safety; when drugs or mechanical restraints are being used excessively and numerous other professional matters. The court made decisions involving credibility and weight to resolve these conflicts. In assessing credibility, the court took into account the demeanor of the witnesses, any interest or bias, and the knowledge, education and training of the witnesses in the field of mental retardation. In addition to credibility decisions, the court relied heavily on the reports and recommendations of the Secretary's professionals to define "accepted professional judgment, practice and standards" for application to the facts of this case. *Youngberg*, 457 U.S. at 323. The court did not attempt to determine which of several professionally acceptable choices should have been made. Instead, in reviewing the voluminous evidence to determine if the Secretary is providing minimally adequate training, the court deferred to the reasonable judgments of qualified professionals.

II. FINDINGS OF FACT

A. Plaintiff-Intervenors

1. *Jeanette H.*

Intervenor Jeanette H. was admitted to Dorothea Dix Hospital in Raleigh in 1981. She was originally diagnosed as suffering from chronic undifferentiated schizophrenia, but this diagnosis was later dropped. She is diagnosed as mildly mentally retarded. Early in her admission, it was recognized by the state's treating professionals that she needed a supervised living situation in the community. Pl. Ex. 31 at 2. Nonetheless, she was kept at Dix and continuously medicated. She had behavior problems that did not improve with the medication. While at Dix, she suffered a severe case of lithium toxicity. Since becoming an intervenor in this case, she was enrolled in a sheltered workshop, her medication was reduced, and in January of 1987 she was discharged from Dix to a family care home in the community. Pl. Ex. 31.

2. *Todd C.*

Todd C. is a resident of Dix Hospital. He was diagnosed as having an intellectual function on the borderline between average intelligence and mild mental retardation. He was also diagnosed as suffering from an atypical psychosis by history, histrionic personality disorder, seizure disorder, and hydrocephaly. He lives on a "management stepdown" ward which houses mentally ill patients at a maintenance stage of treatment. When Mr. C. was admitted to Dix in 1981, the state's professionals noted that "a psychiatric admission ward is not adequate treatment for this patient." Over the next five years, less restrictive, community-based placements were repeatedly recommended for Mr. C. by the Secretary's professionals. Despite these recommendations, Mr. C. remains at Dix Hospital. He has frequently been secluded and mechanically restrained. Pl. Ex. 30.

3. *Phillip B.*

Phillip B. was admitted to Dix Hospital in March of 1983. He has been diagnosed as functioning intellectually in the moderate to severe mental retardation range. He has not been diagnosed as suffering from any mental illness. He was hospitalized at Dix after "a few violent outbursts" at a group home. His treatment professionals recommended community placement, but he had to wait for several months at Dix during which time his behavior regressed. Pl. Ex. 32 at 4. At his commitment hearing in January of 1984, the attorney representing Mr. B. admitted to the court that he would be kept at Dix even if he did not meet commitment criteria. Pl. Ex. 27 at 4. After Mr. B. was permitted to intervene in this case, he was discharged from Dix Hospital. He is now living successfully in the community. Pl. Ex. 32.

4. *Margaret R.*

Margaret R. was first admitted to Broughton Hospital in 1973. She has been diagnosed as suffering from organic brain syndrome and an organic personality disorder. She appears to function in the range of mild mental retardation. After intervening in this case, Ms. R. was placed in a rest home for the aged. The rest home where Ms. R. was placed is the same one used for

Thomas S. and found by this court to be inconsistent with the professional judgment of those who examined and treated Thomas S. 601 F.Supp. at 1058-59. This home does not offer necessary services for mentally retarded people. This placement was the Secretary's attempt to implement the long-standing recommendation of the state's treating professionals that Ms. R. be placed in a less restrictive, community-based residence (such as a group home for the mentally retarded). After the rest home refused to continue to care for Ms. R., she was returned to Broughton Hospital. Ms. R. has no diagnosis of mental illness, yet she continues to live on a general psychiatric ward. Ms. R. appeared and testified in the evidentiary hearing in this case. She expressed her desire to live in the community, but there is no appropriate program for her. Tr. 232, 505, 527.

B. Plaintiff Class

1. *Description of the Class and General Findings*

There are approximately four hundred mentally retarded class members in the state's four psychiatric hospitals. The estimated number of class members has ranged from 393 to 470. Approximately half or more of those persons have no diagnosis of mental illness. Pl. Ex. 42 at 8. For example, on February 27, 1986, forty-seven percent of the class members confined at the state psychiatric hospitals had a diagnosis of mental retardation only. Pl. Ex. 10.

Mental retardation involves difficulty and slowness in learning and delayed development of intellectual functioning. *Youngberg*, 457 U.S. at 309 n.1; Glenn Dep. at 22-23. Mental illness, on the other hand, involves a disturbance of emotions or thinking, from whatever cause, which interferes with a person's ability to handle life situations. Glenn Dep. at 23; Tr. 23. The psychiatric facilities use a medical model which starts with the concept that a person has a sickness and that sickness is treated. The mental retardation/developmental disability model provides an opportunity for development. It provides training and educa-

tion called "habilitation." Tr. 556-57; Pl. Ex. 46 at 3. Habilitation is defined as follows:

> "The process by which the staff of an agency assists an individual to acquire and maintain those life skills that enable the individual to cope more effectively with the demands of his or her own person and environmental and social functioning. Habilitation includes, but is not limited to, programs of formal structured education and treatment."

Association For Retarded Citizens of North Dakota v. Olson, 561 F.Supp. 473, 488 n.20 (D.N.D. 1983) (quoting Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons, "Standards for Services for Developmentally Disabled Persons" (1981 edition)).

Of approximately 470 adults with mental retardation in the hospitals, 404 were identified as being confined in general psychiatric wards of the hospitals. Pl. Ex. 3 at 1-2. Only one of the hospitals (Broughton) has a unit designated for mentally retarded people and that unit houses some but not all of the class members at Broughton. There is a professional consensus that mentally retarded people who are continuously exposed to mentally ill patients begin to "model" the dysfunctional behaviors of the mentally ill patients with whom they are confined. Pl. Ex. 43 at 45-54; Pl. Ex. 46 at 15; Glenn Dep. at 32-33. There is also professional consensus that developmental, behavior-based treatment called "habilitation" is the appropriate milieu for people with mental retardation.

More than half of the class members have been identified as being "voluntarily" committed to the psychiatric institutions pursuant to N.C.Gen.Stat. § 122C-211 (1986). Most of these class members have no guardian and have signed themselves into the institution. Pl. Ex. 19. A number of the "voluntarily" institu-

tionalized plaintiffs who do not have guardians are severely mentally retarded and lack the capacity to understand the legal step they have taken. Pl. Ex. 18 at 2.

Many of the class members who were originally identified by the Secretary on discovery as having a diagnosis of mental retardation were later reclassified by the Secretary as having a behavior disorder. A behavior disorder is a problem some mentally retarded people have in conducting themselves, which is characterized by self-injury, aggressiveness, or rage reactions. It is not considered a mental illness. Tr. 23, 204. It is considered a "grab-bag" term which is sometimes used to label clients who are a management problem. Tr. 415.

There are striking similarities between the conditions which led to the relief granted original plaintiff Thomas S. and the conditions in which the intervenors and plaintiff class members are forced to live. For example, at Broughton Hospital alone there are at least thirty-five class members for whom group home or family care placement in the community has been recommended by the Secretary's treating professionals. Despite these recommendations, many of these plaintiffs remain confined in state psychiatric hospitals. The record is replete with other examples of placement and treatment recommendations being ignored or their implementation being unjustifiably delayed. Numerous other constitutional violations have been established, including the following, which are discussed in detail below:

(a) Many of the plaintiffs have no diagnosis of mental illness, yet they are placed in facilities for the mentally ill.

(b) Some of the plaintiffs have been inappropriately placed in rest homes for the elderly.

(c) Many of the plaintiffs have behavioral problems which make them difficult patients to treat. This difficulty is frequently used by the state to justify inappropriate placements.

(d) Many of the plaintiffs have been recommended for appropriate placement and treatment in less restrictive residential settings, including group homes or specialized foster care. These recommendations, made by state employees (including doctors, social workers, psychologists, and occupational therapists) were often incorporated in treatment plans. The placement recommendations and the treatment plans are frequently ignored, and the plaintiffs remain confined year after year in state psychiatric institutions.

(e) At times the people responsible for consenting to or approving commitment of a class member to a state psychiatric hospital do so because there is literally no other place for the class member to go.

(f) For many of the plaintiffs, there are no established alternatives to placement in a state psychiatric hospital. The state has chosen not to make appropriate alternatives available. For other plaintiffs, established alternatives (such as state facilities designed to treat mental retardation) are unavailable.

(g) Many of the plaintiffs are wards of the state. Further, the state has control over the liberty and care of each class member while he or she is committed to a state psychiatric institution. Some class members have been kept in a state psychiatric hospital long after the original commitment order required their release.

2. *Aggression, Self-Abuse and Other Physical Injury*

Class members have been physically injured as a result of the conditions at the four state psychiatric institutions. Approximately fifteen percent of the institutionalized class members

engage in self-injurious behavior. Pl. Ex. 13 at 2. Other class members engage in assaultive behavior. Pl. Ex. 10. When appropriate services are offered, self-injurious and aggressive behaviors are significantly reduced or totally extinguished. Tr. 49-50.

Aggression or assaultive behavior in mentally retarded people can be caused by crowding, noise levels, frustration, or lack of appropriate training. The state's mental retardation deputy explained, for example, that if a mentally retarded person is told to "make your bed" and that person does not know how to make the bed and does not know how to tell the person giving the command, "I don't know how to do that," he or she can get very frustrated and may attack the person who gave the command. Mentally retarded people are often excluded from the opportunity to learn because of assaultive behavior of this type that results from their frustration. Pl. Ex. 44 at 8-9, 15.

"Habilitation" is a term used to refer to the process of helping a person with mental retardation acquire needed skills. The principal focus of habilitation is on learning and training, because mental retardation is a learning disability and a training impairment, rather than an illness. *Youngberg*, 457 U.S. at 309 n.1; Pl. Ex. 46 at 3; Pl. Ex. 44 at 12.

The Secretary offers few, if any, habilitation or behavior programs for mentally retarded adults confined in the state psychiatric hospitals. When behavioral modification treatment is offered, the evidence suggests that the treatment is not adequately individualized, monitored, or re-evaluated to comport with minimal professional standards for treatment of mentally retarded persons.

Due to inadequate behavioral programming, class members are sometimes injured at their own hands. Pl. Ex. 42 at 4. For example, Guy W., class member at Broughton Hospital, has been institutionalized since 1936 when he was sixteen years old. He began to self-induce vomiting in 1979. His treatment plan shows that his primary habilitation need in order to be discharged from the institution is to improve his behavior. Yet, no training has been provided to help him learn to stop this behavior.

Danny W. is a member of the class. He is blind, mentally retarded, and confined to a ward at Broughton Hospital. He engages in self-abusive behavior. He bites his hand, and he has begun to eat feces. He sits in a wheelchair on a very handicapped ward with very little to do. He has not been given any sort of habilitation. Tr. 52.

A behavior plan was proposed for intervenor Todd C. to stop him from self-abusive behavior, but it was not used for several years. The Secretary made no attempt to justify this failure to follow the professional recommendation.

On some wards, there are not enough staff members to assure safety of the residents. Glenn Dep. at 35-36, 63; Pl. Ex. 41 at 16.

Some class members have been injured by the lack of adaptive equipment or the improper use thereof. Glenn Dep. at 106-08; P. Ex. 41 at 4. Mary W. has been severely injured. Pl. Ex. 42 at 10; Tr. 39-50, 93.

3. *Drugs*

Class members have been seriously endangered and injured by the inappropriate use of antipsychotic drugs. This group of drugs belongs to a class of psychotropic medications used to treat certain psychiatric disorders. The terms "antipsychotic," "neuroleptic," and "psychotropic" have been used interchangeably throughout the evidence, but have different meanings. Antipsychotic drugs are drugs used to treat psychotic disorders where people are not in touch with reality. Tr. 148. Antipsychotic drugs include Thorazine, Mellaril, Haldol, Loxitane, Prolixin, and a number of others. Tr. 298. They are not useful in treating or relieving the effects of mental retardation. Pl. Ex. 50.

Of class members institutionalized at three of the four state psychiatric hospitals, seventy-three percent were being given antipsychotic drugs, yet forty-three percent of that group has no diagnosis of mental illness. Tr. 230.

i. Adverse Effects.

Antipsychotic drugs are dangerous and can cause a number of severe adverse effects, including tardive dyskinesia, an irreversible neurological disease where a person has involuntary movements of the face, arms and legs. Tr. 149-50, 376. Tardive dyskinesia occurs in people without regard to their mental condition, Tr. 370, and about thirty percent of people who receive prolonged antipsychotic drugs develop tardive dyskinesia. Tr. 208.

Professional standards and the Secretary's policies require periodic monitoring of drug adverse effects. Pl. Ex. 52 at 28; Def. Ex. 8; Tr. 339-40. This has not been done for most class members. Pl. Ex. 42 at 2, #5; Pl. Ex. 42 at 4, #1(b); Tr. 225, 342-43. The evidence shows that the Secretary's agents' use of antipsychotic drugs on the class members in their custody has resulted in tardive dyskinesia for a number of class members. Pl. Ex. 42 at 2, ##3-4; Pl. Ex. 42 at 4, #2; Pl. Ex. 22 at 2; Tr. 330, 338.

Plaintiffs' pharmocological expert, Dr. Henry Crabbe, personally examined thirty-three class members who were being given antipsychotic drugs at three of the state psychiatric institutions. Based on the brief personal examination alone, Dr. Crabbe observed that of those examined at Cherry Hospital, eighty-eight percent manifested symptoms of adverse effects; forty percent showed such symptoms at Broughton Hospital; and thirty-three percent showed such symptoms at Dix Hospital. Tr. 151, 223-24.

ii. Standards for Avoiding, Minimizing and Treating Adverse Effects.

Because of these serious adverse effects from antipsychotic drugs, minimal professional standards as well as the Secretary's written policies require that patients, their families, and/or their legal guardians be informed about the risks, side effects and benefits of psychotropic medications. Pl. Ex. 52 at 28; Tr. 339-40; Def. Ex. 56.

The Secretary introduced a number of policies from the Standards of Clinical Practice Manual and the Nursing Policy Manual at Dorothea Dix Hospital and some policies that apply statewide. The standards on medical education provide that patients or their legal guardians shall be informed about the risks, side effects and benefits of specific medications including psychotropics, and that evidence of this instruction as well as the patient's response to it be documented in the patient's medical record.

The Secretary and his agents have failed to follow these policies for many class members. None of the records of class members presented to the court reflect that these policies were ever applied to them. Pl. Exs. 30, 31, 32, 42; Def. Exs. 14, 15, 36. Class member Thelma B., who is *severely* retarded, is purported to have signed an "X" to "informed" consent for medication. Pl. Ex. 42 at 4, ##11-12; Pl. Ex. 39. Professional standards also require a periodic review of the antipsychotic drug prescriptions to see if they are needed. Pl. Ex. 52 at 5; Tr. 339-40; Pl. Ex. 43 at 16. Yet this has not been done for some class members. Pl. Ex. 43 at 31.

Medical standards require continuing efforts to reduce the amount of neuroleptic drugs a person receives. Tr. 337; Pl. Ex. 52 at 5; Tr. 339-40. This was not done for a number of class members. Pl. Ex. 41 at 16; Tr. 175-76, 337-38.

In a study based on the medical records of thirty-nine patients (out of a population of 675) at Dix Hospital, it was determined that in twenty-one percent of the cases, medication was

not reduced even where tardive dyskinesia was diagnosed. Tr. 378. This violates state and national standards. Pl. Ex. 52 at 28.

Medical record keeping is substandard and dangerously inadequate. Tr. 172, 225, 334-35.

iii. Behavior Control.

One of the ways the Secretary has most endangered plaintiffs is by the long-term use of antipsychotic drugs for the purported purpose of controlling behavior disorders. Evidence was introduced that the American Psychiatric Association published a Tardive Dyskinesia Task Force Report in 1979 finding that the efficacy and safety of the long-term or "maintenance" use of antipsychotic drugs for mentally retarded people with behavior disorders had not been adequately demonstrated. Pl. Ex. 50. Medical standards proscribe the long-term (or "maintenance") administration of antipsychotic drugs to mentally retarded people with no mental illness, even if they have a behavior problem. Pl. Ex. 42 at ##1-2, 1-2; Pl. Ex. 42 at 5, #3; Tr. 151, 169-71, 339-40; Pl. Ex. 52 at 28.

Even on a short-term basis, it is not acceptable to rely on drugs to the exclusion of other methods to treat people with behavior problems. Yet the Secretary has used drugs in this way on many class members. Glenn Dep. at 38-39, 46, 49, 62; Pl. Ex. 41, at 9, 16, 17; Tr. 50-51, 152, 164-66, 174, 417; Pl. Ex. 43 at 18.

For example, Mary W. has been on anti*psychotic* drugs even though in 1953 she was not psychotic but, rather, "a mentally *deficient* person for whom the hospital has nothing to offer." The drugs are purportedly used for her behavior problem. This has continued since the 1950's without any documented behavior training, even though her condition worsened and the records show that medication was not effective. Pl. Ex. 42 at 4, #1; Tr. 50-51.

Other class members have also been sedated by the long-term use of antipsychotic drugs in lieu of behavioral program and without any regard to the safety or usefulness of the drugs for the class members. Pl. Ex. 42 at 5,## 3-4.

iv. Chemical Restraint.

"PRN" medications are medications given pursuant to a physician's standing order which allows lower level hospital staff to use their own discretion to decide when to administer a drug. When it involves antipsychotic and related medications, it is a form of chemical restraint. In long-term residential units, its use can result in overmedication in lieu of alternative behavior programming. Twenty-four percent of class members at Broughton Hospital were subjected to chemical restraint during a recent one-month period; at Dix Hospital, the figure was sixty-one percent; at Cherry Hospital, the figure was seventy percent. Tr. 173-175. Many states have rules for facilities for the mentally retarded which prohibit this practice of giving antipsychotic drugs "PRN." Tr. 174.

Data on the frequency of use of "PRN Med Restraint" during one month show that, at least in some cases, there is no correlation between the use of such restraints and incidents of aggression toward self and others. One class member received "PRN meds" twenty-three times in a month, with only four reported incidents of "aggression." Another class member was given "PRN meds" twenty-one times, but only three incidents of aggression were reported. Pl. Ex. 10 at 25-28. The court does not find that the use of chemical restraint in emergency situations is a substantial departure from professional judgment. However, these illustrations tend to show that when chemical restraints are authorized "PRN," they are overused and represent a substantial departure from the professional judgment of a qualified treating professional.

v. Excessive Dosages.

The Secretary administers excessive dosages of drugs to class members. Pl. Ex. 43 at 31. This unnecessarily subjects them to risks of overmedication. There is a professional consensus that the usual maintenance or long-term dose for antipsychotic medication translates into the equivalent of 200-300 milligrams of Thorazine. Most of the institutionalized class members are on a long-term regimen of antipsychotic drugs. The average Thorazine equivalent dosage among the state hospitals varies markedly but is always far above the professionally accepted usual maintenance dose. Among the class members sampled, the average daily Thorazine equivalent was 592 milligrams at Dix Hospital, 746 milligrams at Broughton Hospital, and 1,114 milligrams at Cherry Hospital. Where doses are higher, there is a higher likelihood of adverse effects.

The Secretary made no effort to explain these variations or excessive dosages. Tr. 179-82. The standard used at Cherry Hospital for the daily dosage range of antipsychotic drugs is so broad that it is acceptable under that standard for a large dose to be forty times greater than a low dose, and the decision is a pure judgment call by the doctor. Tr. 551; Def. Ex. 45 at 4. There are instances where class members are given dosages which exceed even the institution's own guidelines, with no justification given. To exceed established drug dosage maximum limits without showing a justification is a substantial departure from professional standards. Tr. 176-77.

The Secretary administered the psychotropic drug Lithium to named intervening plaintiff Jeanette H. so that the level of Lithium in her blood reached 6.58 -- an alarming level. Plaintiff's psychopharmocological expert had never seen a patient have a blood lithium level of more than 3.9 and still live. Tr. 166-68. In fact, Jeanette H. went into a coma and was transferred to the critical care unit for Lithium toxicity. During the time she was being given Lithium, the Secretary was also giving her Thorazine. Pl. Ex. 31 at 3, 9-13.

vi. Polypharmacy.

The Secretary admits that some types of polypharmacy, such as administering more than one antipsychotic drug to a person at one time, are not generally accepted medical practice. Tr. 423. Nevertheless, this is done to some class members. Intervenor Jeanette H. was kept on a number of antipsychotic drugs together including Thorazine and Prolixin. Tr. 398. Class member Freddie S. continued to receive three different psychotropic medications, despite the fact that his assessment shows he benefits little from the medication. Pl. Ex. 38. No explanation was offered by the Secretary for these departures from professional standards.

The manner in which the Secretary has administered antipsychotic drugs to class members, in violation of the standards discussed above, is a substantial departure from the exercise of professional judgment. Tr. 182.

4. *Seclusion and Mechanical Restraint*

Mechanical restraint is the practice of tying or strapping someone to a bed or a chair. Seclusion is the practice of confining a patient alone in a bare room. Glenn Dep. at 38; Def. Ex. 11.

It is a substantial departure from professional standards to rely routinely on seclusion and restraint rather than systematic behavior techniques such as social reinforcement to control aggressive behavior. Seclusion and restraint should only be used as a last resort. Glenn Dep. at 38; Pl. Ex. 42 at 6-7; Pl. Ex. 43 at 44; Pl. Ex. 45 at 24-26.

In the state psychiatric institutions, however, seclusion and restraint are used often on plaintiffs. About seventeen percent of the class members were secluded or restrained during a reported one-month period, including eleven plaintiffs who were restrained fifty-three times even though they had no documented

evidence of aggression towards themselves or others. Pl. Ex. 10; Pl. Ex. 42 at 5; Tr. 53. Class members are more likely to be subject to mechanical restraint in defendant's psychiatric institutions than when they are elsewhere. Pl. Ex. 44 at 6. Some class members have been mechanically restrained when they were noisy or annoying to other patients.

For example, class member Magdeline S. has been secluded and restrained for hollering and she has sometimes not been released when she quieted down. Pl. Ex. 42 at 5-6, #4. The Secretary repeatedly restrained class member Geraldine G. of Broughton Hospital for being noisy and annoying other patients. Tr. 63. Class member Mary W. at Broughton Hospital engaged in self-injurious behavior in the form of hitting herself in the head. She has been in soft body restraints or a geriatric chair (a type of restraint) for almost all of the time since the late 1940's. The restraint started out at nine hours a day most days (in the mid to late 1940's), then increased to nineteen hours, then to twenty-four hours a day. For decades and continuing to the present, she has been restrained for all of her waking hours. The records do not reveal that behavior training was ever considered or tried to help her stop trying to hit herself. In 1975 a doctor recommended fitting her with boxing gloves so she would not injure herself with her hands. However, gloves were never even tried because she had no money in her account. Pl. Ex. 33. The use of restraint on Mary W. in this manner is a substantial departure from professional judgment which the Secretary has not attempted to explain. Pl. Ex. 42 at 6, #5; Tr. 39, 42, 47, 48, 50, 51.

Formerly a member of the *Willie M* class, class member Fred S. is now twenty-one years old and is in Dix Hospital. Since there is no adequate behavioral training to stop his assaultive behavior, the staff continues to seclude and mechanically restrain him when he acts aggressively. He was secluded and restrained almost sixty percent of the days he has been at Dix. The average time in seclusion on those days has been 2.9 hours. For almost all of the time he was secluded, he was restrained (usually four-point restraint -- spread-eagled). During one two-week period, Fred S. was secluded for eleven of fourteen days with an average seclusion period for each of 6.4 hours. The Secretary has failed to explain this excessive use of seclusion and mechanical restraint

and has failed to provide class members with adequate training to overcome the behavior problems that trigger it. See Section II.B.7, *infra*.

5. *Unnecessary Confinement*

Many of the plaintiffs have been unnecessarily confined in locked wards of psychiatric hospitals for lengthy periods of time, despite a professional consensus that they need not be locked up in that way even if they have some mental illness or behavior problems and notwithstanding the recommendations of individual treatment professionals that they be placed in less restrictive environments in the community. Pl. Ex. 44 at 2-3; Pl. Ex. 43 at 2, 24-25, 36; Pl. Ex. 46 at 29.

i. Locked wards.

In the four state psychiatric hospitals where mentally retarded persons are housed, almost all of the wards are locked, at least for part of the day, and movement within the wards is contained by staff. Pl. Ex. 41 at 4; Tr. 26, 107. Many class members on locked wards could live in a more open setting if such were available. Glenn Dep. at 32, 110-11.

ii. Institutional Confinement.

The evidence established that psychiatric stabilization normally takes approximately twenty-one days and that behavior stabilization normally takes thirty to one hundred and twenty days. Pl. Ex. 45 at 21; Pl. Ex. 6. Class members, however, stay an average of ten years in the state psychiatric institutions. Pl. Ex. 42 at 7, #1(b); Tr. 70. At Cherry Hospital, the average class member has been confined for twenty-five years. Tr. 70; Pl. Ex. 14. At Dix Hospital, almost half of the class members have been confined for over fifteen years. Pl. Ex. 42 at 7, #2. No attempt was made by the Secretary to justify such lengthy hospitalizations or to explain regional differences. The Secretary's agents admit that many class members have been hospitalized much longer

than is appropriate for them and that many others should not be there at all. Pl. Ex. 46 at 29. Like the original named plaintiff, Thomas S., many mentally retarded persons who are now at the state psychiatric institutions do not need to be institionalized even if they also have mental illness or behavior disorder. Pl. Ex. 44 at 2-3; Def. Ex. 16 at 92; Glenn Dep. at 128-29.

The North Carolina Mental Health, Mental Retardation, and Substance Abuse Act of 1985 authorizes involuntary commitment of persons who are mentally ill and dangerous to themselves or others, or who are mentally retarded and have a behavior disorder and are dangerous to themselves or others. N.C.Gen.Stat. § 122C-261 (1986). However, the Secretary has involuntarily confined persons who do not in fact meet this standard. Tr. 239, 255.

As in the case of Thomas S. himself, such institutional confinement results from an absence of appropriate alternatives and is not based on professional judgment. Tr. 115-17; Pl. Ex. 44 at 4.

There are 238 class members incarcerated in the psychiatric institutions on what is termed a "voluntary" status, but the facts indicate that their confinement is not truly voluntary. Some have been "volunteered" into the institution by a guardian, just as was Thomas S., including some who have no mental illness. Tr. 256. Others do not have a guardian, but have signed themselves into the institution. Many of these have mental retardation to such a degree that they cannot exercise informed consent to make such an important legal decision. Pl. Ex. 42 at 8, ##7-11; Tr. 25, Pl. Ex. 39. They have purportedly signed themselves in even though they did not know what they were signing. Tr. 241; Pl. Ex. 39.

Some class members are involuntarily committed following a court hearing because they have no place else to go. Class members' appointed counsel have stipulated that their clients meet the commitment standard even when they do not, because the attorney knows that a discharge from the hospital would result in the person being dumped into the streets with no place to go. Tr. 251-52. Judges have committed class members while ac-

knowledging that the decision is made for humanitarian reasons even though the legal standard has not been met. That is what happened in the case of class member Phillip B. *Id.*; Pl. Ex. 27.

In a few cases, again because there was no place else to go, class members have been held at the hospital, in some cases for years, following a court decision that they be discharged. Pl. Ex. 42 at 7-8, ##4-6.

Class member Jacob B. has been kept at Cherry Hospital since 1960, even though the Secretary's professionals think that he should have been released into the community many years ago and probably should never have been in the institution in the first place. Pl. Ex. 43 at 21.

When intervenor Jeanette H. entered Dorothea Dix Hospital in 1981, it was recognized by her treating professionals that she needed a supervised living situation in the community. Such a setting was not available. In June of 1983, Jeanette's treatment team continued to recommend placement in a group home with a sheltered workshop program for Jeanette. Jeanette's treatment plan of December 20, 1983, recognized that she "possesses all the necessary skills for semi-independent living outside the institution." Jeanette continued to be confined in the institution for three more years, despite this recommendation by her treating professional. Pl. Ex. 31 at 2, 6-7.

At Broughton Hospital, there are at least eleven class members on Ward 36, twelve on Ward 37, five on Ward 10, and seven on Ward 11 for whom group home or family care placement in the community has been recommended but not implemented. Pl. Ex. 21.

With regard to named plaintiff Todd C., it was recommended by mental retardation professionals that community residential facilities that are less restrictive than Dorothea Dix Hospital, and which offer vocational opportunities and appropriate structure including behavior management, strategies, and instructional strategies be tried. Pl. Ex. 29 at 2. Again in January of 1986, Todd C.'s treating physician recommended that

he be placed in a less restrictive setting within twelve months. He was finally placed in a community based residential program on December 4, 1987, almost two years later.

6. *Association/Access to Community*

Thirty-three percent of institutionalized class members have little or no social interaction. Pl. Ex. 42 at 7, #1a.

Many are desperate for the attention and affection which they are not getting in the institution. Tr. 89.

According to the Secretary's expert Smull, mentally retarded persons have a higher sense of self-worth and self-esteem when they feel that they are part of the community. A person's self-esteem is essential for habilitation. Adequate involvement in community activities for mentally retarded persons consists of being as involved as that individual is capable of being at the time. Pl. Ex. 45 at 11-12, 17.

Most class members in the state psychiatric institutions have inadequate access to community activities. Pl. Ex. 41 at 17-18; Pl. Ex. 45 at 33. The court's findings concerning unnecessary confinement are also relevant to the issue of access to the community.

Class members are forced to associate almost exclusively with other institutionalized mentally disabled people along with staff members on revolving shifts. Pl. Ex. 41 at 17-18. In many cases, this forced association is unnecessary and does not reflect the exercise of professional judgment; instead, it is a function of the location, design, and size of the facilities. *Id.* State psychiatric institutions are like ghettos for persons with mental handicaps. The lack of access to the outside world gives the feeling of being in prison. Pl. Ex. 46 at 16.

Class member Calvin A. at John Umstead Hospital likes to run away, go uptown to a restaurant and get himself a sandwich and a cup of coffee. His treatment plan was designed to discourage and prevent this access to socializing in the community. Def. Ex. 16 at 177.

7. *Habilitation*

For class members, "minimally adequate training" within the meaning of *Youngberg* requires the Secretary to offer reasonable habilitation services. 457 U.S. at 317. The Secretary's experts concur with those of plaintiffs that minimum professional standards require *developmentally* oriented "habilitation" for persons with mental retardation. Pl. Ex. 44 at 12, 22; Pl. Ex. 41 at 19; Tr. 31, 145; Glenn Dep. at 27.

"Habilitation" is the process of helping a person with mental retardation to acquire needed self-care skills. The term refers specifically to the needs of mentally retarded individuals. Tr. 30, 89-90, 294-95; *Youngberg*, 457 U.S. at 309 n.1. Developmental habilitation leads persons through stages of human development to increase their capacity for living more independently. Glenn Dep. at 26. All class members, including those who also have mental illness, are entitled to developmental habilitation. Pl. Ex. 41 at 4-5, 18.

i. Individual Evaluations and Treatment.

The first condition of providing appropriate habilitation is a good interdisciplinary evaluation. The Secretary's professionals and plaintiffs' experts agree that adequate assessment of the individual needs of each class member is an essential prerequisite. Pl. Ex. 15; Glenn Dep. at 20, 54-55, 64; Tr. 34, 146, 325; Pl. Ex. 43 at 33-34; Pl. Ex. 44 at 11.

For the great majority of class members, however, there is no interdisciplinary assessment, and those that do occur are inadequate. Pl. Ex. 45 at 38; Glenn Dep. at 37, 46, 49, 53-55, 60; Pl. Ex. 41 at 5, 13, 16. The Secretary has failed to treat each class member as an individual with unique needs. Instead, class mem-

bers are placed in existing programs that are the same for everyone, regardless of need. This is a substantial departure from minimally acceptable professional standards for treatment of mentally retarded persons. Pl. Ex. 15; Tr. 32, 145, 325; Glenn Dep. at 14, 20, 32, 65; Pl. Ex. 41 at 4, 13, 16-17.

ii. Trained Staff.

Properly trained staff are also a prerequisite to providing developmental habilitation. Tr. 38; Pl. Ex. 44 at 16-17; Pl. Ex. 27; Pl. Ex. 45 at 38-39. In the state psychiatric hospitals, trained staff are not available for class members, particularly on general psychiatric units, where the vast majority of class members reside. Glenn Dep. at 35-36; Pl. Ex. 45 at 38-39; Tr. 38.

One reason for the Secretary's failure to provide properly trained staff is the *medical rather than developmental orientation of the state mental hospitals*. Glenn Dep. at 26-27; Pl. Ex. 41 at 11. In the words of the assistant clinical director at Cherry Hospital, "[w]e are not in the business of treating with the adult developmental model." Tr. 556.

Since medical retardation is not a medical problem, medical training by itself does not qualify a person to work as a mental retardation professional. Tr. 138, 407-08. Many of the staff in state psychiatric hospitals who are deciding the fate of class members are not trained to be mental retardation professionals. Pl. Ex. 45 at 38-39

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iii. Inhumane Living Conditions.

Humane living conditions are a prerequisite for habilitation. Pl. Ex. 41 at 4. Many class members are subjected to inhumane living conditions in state psychiatric institutions, including: overcrowding; total lack of personal space and privacy; inadequate furnishings and clothing; aesthetically barren physical surroundings; and endless days of boredom without variation. Pl. Ex. 43 at 4, 35; Pl. Ex. 41 at 4, 14-16; Pl. Ex. 45 at 33; Tr. 25-27.

Keeping mentally retarded people in such living conditions represents a substantial departure from minimally acceptable professional standards. Glenn Dep. at 31-32; Pl. Ex. 41 at 4.

iv. Abnormal Environment.

Professionals unanimously agree that mentally retarded persons need to be treated in as normal a setting as possible. Tr. 66, 145; Pl. Ex. 44 at 22; Pl. Ex. 45 at 34. Access to ordinary activities is essential for learning. Mentally retarded adults learn and grow through observing and participating in the commonplace events of daily life. Glenn Dep. at 32, 73; Pl. Ex. 41 at 28; Tr. 31-32. Class members are more likely to learn independent living skills in a family-type situation where there is continuous and constant opportunity to practice those skills than in an institution. Tr. 32; Pl. Ex. 43 at 54; Pl. Ex. 44 at 13; Pl. Ex. 45 at 24-26.

The state psychiatric institutions provide very abnormal living environments. Tr. 31; Pl. Ex. 45 at 36. As a result, treatment of class members is seriously compromised. Within the state psychiatric hospitals, there are not enough structured activities to keep class members from developing inappropriate behaviors or losing independent living skills in the abnormal institutional environment. They learn to live in an institution, and their ability to be integrated into the community and adapt to community life deteriorates. Glenn Dep. at 44-46, 132; Tr. 90; Pl. Ex. 43 at 26-27.

Mentally retarded persons learn by observation, but they do not always have the insight to distinguish appropriate from inappropriate behavior. Thus, when class members are confined with mentally ill people, they copy the social behavior of the mentally ill patients. This is called modeling. It further harms the class members and further reduces their chances of living in a normal setting. Glenn Dep. at 32-33; Pl. Ex. 41 at 4; Pl. Ex. 43 at 45-56; Pl. Ex. 46 at 15.

For example, in April, 1986, the attending psychiatrist of named plaintiff Jeanette H. found that Ms. H.'s behavior problems were caused by the fact that she was a retarded person

residing within a hospital geared to treat the mentally ill. Pl. Ex. 31 at 31. By January, 1987, this psychiatrist recognized that Jeanette's behavior while residing within the hospital was chaotic, but that when she attended her sheltered workshop assignment in the community, she was "one of the best residents in attendance there." Pl. Ex. 31 at 46.

v. Unavailable Services.

There is no dispute that class members need developmental training and structured programs. This includes, for example, training in basic self-care skills, community living skills, speech therapy, and vocational services. Pl. Ex. 43 at 3, 11-13, 20; Pl. Ex. 45 at 15, 32, 34, 39. Because vocational activities are often a key to greater independence and enjoyment of liberty, they are for most class members an essential service to avoid unnecessary restraint. Pl. Ex. 42 at 10, #6. However, vocational services are not available to most class members. Pl. Ex. 19 at 3. Adequate programs for speech, behavior, and self-care skills also are not available. Pl. Ex. 43 at 18; Glenn Dep. at 43-44, 49, 55, 60; Pl. Ex. 43 at 15.

Class members have little, if any, hope of maintaining or improving their self-care skills because they are not offered treatment designed for the learning disabled. Pl. Ex. 42 at 10, #6, and at 11, ##1-3. Class member Jacob B. was at Cherry Hospital for twenty-two years. He never went to school there. He is described as mentally disturbed because he talks to his fingers out of boredom and loneliness. Pl. Ex. 43 at 28. He does very well in structured activity but does not get what he needs, according to Secretary's experts. The Secretary terminated a greenhouse program he was in. Pl. Ex. 43 at 19. Other programs serving class members also have been terminated by the Secretary without regard to the needs of the clients. Pl. Ex. 43 at 2.

vi. Behavior Problems.

As was true in the case of Thomas S., many class members have behavioral problems which make them difficult to treat. As was true for Thomas S., however, this difficulty does not excuse the Secretary from providing appropriate placement and services. This court has already stated that "[p]eople with problems are rarely easy to deal with. If plaintiff were 'normal,' then he would not need the treatment the professionals say he needs." *Thomas S.*, 601 F.Supp. at 1058.

The Secretary's professionals admit that if a class member has a behavior problem, a specific plan should be developed and implemented to reduce the inappropriate behavior by teaching him or her appropriate social behaviors. Pl. Ex. 44 at 12; Pl. Ex. 45 at 24-26; Tr. 417. For the vast majority of class members, this has not been done. Pl. Ex. 42 at 11, #5; Glenn Dep. at 22, 24-25, 31; Pl. Ex. 41 at 13-15, 17, 18a; Pl. Ex. 43 at 15; Pl. Ex. 46 at 15; Tr. 496; Pl. Ex. 42 at 6-7. Intervenor Jeanette H. responded well to a token economy program in 1984, but it was discontinued for reasons unrelated to her needs. Pl. Ex. 31 at 28.

Intervenor Todd C.'s examining physician found that his adaptive level of functioning was "under this patient's potential *due to lack of resources* to control behavioral disorder. A structured environment and residential active treatment in a M.R. [mental retardation] program should improve his level of functioning and production." Pl. Ex. 30 at 2. This was not provided until very recently.

vii. Deterioration and Loss of Self-Care Skills.

People with mental retardation have a problem maintaining the skills that they have. There is a significant risk that unless attention is paid to class members' developmental and habilitation needs, their skills will atrophy and they will regress. Pl. Ex. 44 at 18-19. Some class members have suffered a significant deterioration in the self-care skills they possessed when they were first admitted to the state's care. Some class members have been denied appropriate habilitation for so long that the

Secretary has labeled them institutionalized and given up hope for them. Pl. Ex. 6 at 4. Magdeline S. has been at Dix Hospital since 1930 when she was eleven years old. The Secretary admits that she is so "institutionalized" and "regressed" that community placement is considered by staff to be unrealistic in the absence of an appropriate mental retardation facility. Pl. Ex. 34; Pl. Ex. 42 at 9, ##4(d)(1) and (2). Class member William D. was admitted to Broughton Hospital in 1958. He was able to speak and make statements to the hospital interviewer when he was admitted. By 1985, however, Mr. D. had regressed to the point that he was considered to be nonverbal, and efforts to find a community placement for him were terminated. Pl. Ex. 37.

Another class member, Mary W., cannot feed herself at all. However, the records clearly show that in 1946 she only needed to be spoonfed "at times." Because of her self-abusive behavior, she was tied down for extensive periods of time. Tr. 48. Her legs have therefore atrophied so that she can no longer walk. She contracted tuberculosis in 1969 while in the hospital. She is now virtually mute, uttering two to four stereotyped, "parrot-like" words or phrases over and over.

The Secretary's failure to provide adequate evaluations, staff, humane and normal living conditions, and developmental and behavior programming is a record of failure to exercise professional judgment, making it clear that the state has not provided the professionals with minimally adequate resources for habilitation for plaintiffs.

8. *Lack of Adequate Community Services*

The system administered by the Secretary is plagued by a severe lack of community resources for plaintiffs. This drought of community services results in the unnecessary confinement of class members in highly restrictive settings for lack of another place to go, just as it did for Thomas S. Pl. Ex. 44 at 4, 30; Pl. Ex. 46 at 9-10; Tr. 123. This is true even when legal criteria for hospital admission are not met. Pl. Ex. 27; Tr. 128-29. It also frustrates the exercise of professional judgment by mental health

and mental retardation professionals who become discouraged by the futility, year after year, of recommending services that do not exist. Tr. 115-17; Pl. Ex. 42 at 9-10, #3; Pl. Ex. 46 at 9-10.

Minimum standards require that plans be in place for moving class members to increasingly normal settings. Pl. Ex. 41 at 5; Pl. Ex. 15. For many class members, this planning has not been accomplished. Glenn Dep. at 42, 56, 63-64; Pl. Ex. 9; Pl. Ex. 41 at 6, 7, 8, 16. Dix Hospital has a recently adopted policy to discharge patients who are admitted for mental retardation with behavior disorder to the community or to O'Berry Mental Retardation Center within ninety days if at all possible. Tr. 364. However, the policy is not implemented because community programs are limited and O'Berry Center is full. Tr. 411-12. In Mecklenburg County, hundreds of people are waiting to get into group homes. In Madison County, there are no group homes. Pl. Ex. 46 at 12.

Placement of mentally retarded adults in rest homes does not meet minimally acceptable professional standards, according to mental retardation professions within the state and without. Pl. Ex. 46 at 12-13; Tr. 124-25. Yet many institutionalized class members, including Margaret R., have previously been placed in rest homes. A task force report of the Secretary noted in 1982:

> As it is now, many severely and profoundly mentally retarded clients are medicated -- some heavily -- and put in rest homes because they are not admittable to mental retardation care services, but the rest home may be a less appropriate place for them in terms of their needs.

Pl. Ex. 6 at 5.

The historic reliance on rest home placement with little or no follow-up perpetuates the "revolving door" readmissions of mentally retarded people to the state psychiatric institutions. Pl. Ex. 41 at 18.

Plaintiff Jeanette H. was admitted to Dix in 1978 for behavior problems related to the fact that she could not live at home and the lack of adequate community placements. She had been put in several inappropriate rest homes which offered no developmental or behavioral programming at all and where she exhibited aggressive behavior which caused her to be expelled. She was kept at Dix and continuously given medication that did not improve her behavior, but was not afforded adequate developmental or behavioral programming. She became pregnant while in the hospital. Her psychiatrist noted in 1980 that he saw no need for her to be on antipsychotic drugs but commented that, "[s]he will probably remain in the hospital indefinitely since she has outbursts [of aggressive behavior] every several months ... and also because of her reputation amongst *rest homes* where she has been tried in the past...." Def. Ex. 14 at 21-23 (emphasis added). No options such as adult foster care placement (like that ordered for Thomas S.) or structured group homes were available to be considered for Jeanette.

The Secretary has demonstrated that mentally retarded people with severe behavior disorders, including individuals with mental illness, can receive appropriate treatment in a group home setting. However, the program was discontinued for reasons unrelated to the needs of class members. Pl. Ex. 44 at 22-24.

One reason there are not enough community-based services is funding. In the past, the Division allocated money for group homes, but there has not been an expansion in state-funded group homes in years. Pl. Ex. 47 at 4-6. The professionals are ready to provide adequate services for class members, but funds are not available. Pl. Ex. 46 at 29.

The Secretary's policies and practices regarding allocation of resources to serve the needs of class members are based on political exigencies rather than on the best interests of the individual class members, or even on cost effectiveness. Pl. Ex. 46 at 10.

9. *Professional Judgment*

The lack of minimally adequate programs inside the psychiatric institutions and the lack of community-based services throughout the state system run by the Secretary have prevented the exercise of professional judgment by the Secretary. This has been demonstrated throughout the records of individual class members.

There is a tendency among human service professionals in the state psychiatric institutions to conform their recommendations for treatment or habilitation of class members to the constraints imposed by the state's inadequate service delivery system, rather than to exercise true professional judgment. Tr. 114-15, 127. After recommendations are made that can not be acted on, professionals stop making the recommendations. In many of the instances where an institution clinical record contains a statement to the effect that community placement is not appropriate for a particular client, the writer of the record is likely referring to the limited nature of existing community resources rather than other types of community resources that should be developed in order to allow for the exercise of true professional judgment. Tr. 115-16.

At least one professional was threatened that his career would be jeopardized because of his unwillingness to modify his professional judgment to conform with what was available in the Secretary's institutions. He was also given false information about the time of a court hearing when he attempted to insist upon a course that was dictated in his professional opinion by the needs of the individual, but unavailable in the Secretary's system. Tr. 117, 127.

Some of the Secretary's agents who testified as psychiatric experts made statements in response to questioning by their lawyer that they personally exercised professional judgment or that they believed professional judgment was generally exercised on behalf of class members at the psychiatric hospitals. Tr. 387, 395, 404, 406, 541, 557. They are not mental retardation professionals. Tr. 407-08, 556. These general statements conflict with statements in the records and charts of class mem-

bers in which recommendations for community placement, short-term hospital stays, structured community programs, behavior plans and numerous other specific treatments were not carried out. *See e.g.*, Pl. Ex. 30; Pl. Ex. 31; Pl. Ex. 33. These general statements also conflict with the testimony of plaintiffs' experts and statements produced in internal memoranda and task force reports of defendants in which class members are identified as needing services or community placements that are not available. Pl. Ex. 6; Pl. Ex. 11; Pl. Ex. 12. The Secretary's agent, Dr. Jerry Norton, gave testimony concerning intervenor Margaret R. that conflicts with the substance of a written statement signed by him in March of 1984, just prior to Ms. R.'s asking the court for leave to intervene. Pl. Ex. 26. Dr. Norton testified that he had changed his mind. Tr. 523-24. These conflicts are resolved by the court on the basis of credibility in favor of the opinions of plaintiffs' experts and in favor of the contemporaneous treatment recommendations and observations made by the treating professionals in the plaintiffs' charts. Likewise, such conflicts are resolved in favor of the studies and internal memoranda produced through discovery of the Secretary's agents who are working toward solution of a known problem.

10. *Certification - Accreditation*

The conditions and services at the state psychiatric institutions are substantially below minimally accepted professional standards; they include major violations of very basic human treatment standards. Pl. Ex. 41 at 4.

Adhering to standards for mental retardation services is particularly important if the mentally retarded person also has mental illness or a behavior disorder, because the mental illness or behavior disorder cannot be treated in the absence of a developmental program. Glenn Dep. at 67. Mental illness alone almost never makes developmental programming impossible. Glenn Dep. at 93; Pl. Ex. 44 at 17.

The Secretary produced documentation that the four state psychiatric hospitals are licensed and accredited by the Joint Committee on Accreditation of Hospitals ("JCAH"). This is a private agency made up of the American Medical Association, American Hospital Association, and other health care groups. Tr. 530-31. Accreditation by JCAH does not suffice to indicate that professional judgment is being exercised with regard to mental retardation services. Glenn Dep. at 134-36. Even the Secretary's expert on accreditation agrees with this. Tr. 567. The JCAH standards include some criteria which reflect upon the minimal adequacy of services for mentally retarded people. In some of these areas, the one JCAH survey report in the record shows serious deficiencies which support the conclusions of plaintiffs' experts. During the most recent JCAH survey at Broughton Hospital, in May, 1986, surveyors found:

> (1) Minimal participation of patients and their guardians in treatment planning.
>
> (2) Insufficient professional and support staff to supervise and implement the treatment plan or provide adult educational services.
>
> (3) Inadequate or non-existent emotional, behavioral, activities, legal and vocational assessments.
>
> (4) Inadequate treatment plans and inadequate, documentation of their implementation.
>
> (5) Use of special treatment procedures that are not justified in light of the harm they are known to cause.
>
> (6) The use of seclusion and restraint where written justification is inadequate or non-existent and where less intrusive methods were not considered.

(7) Failure of the hospital administration to monitor the unwarranted use of seclusion and restraint.

(8) Failure of staff to note clients' response to activity services.

(9) Failure to monitor and evaluate the quality and appropriateness of activity services.

(10) Failure to provide adequate education services.

(11) Violation of life safety standards.

Pl. Ex. 54.

Certification by the Health Care Financing Administration ("HCFA") that a facility is eligible for reimbursement under the Medicare and Medicaid programs does not indicate that professional judgment is being exercised with regard to mental retardation services. Like the JCAH standards, the HCFA standards include some criteria which are necessary, but not sufficient, for evaluating the minimal adequacy of services for mentally retarded people. In some of these areas of overlap, the HCFA survey reports in the record show serious deficiencies which support the conclusions of plaintiffs' experts. During a December, 1986, HCFA survey of Broughton Hospital, surveyors found:

(1) Treatment planning is inadequate;

(2) Goals for the client in the treatment plan are not individualized and are geared more to the needs of the staff;

(3) Treatment procedures are too vaguely stated;

(4) It is often not clear which staff member is responsible for particular aspects of treatment;

(5) Frequently, the only treatment ordered was medication and observation;

(6) Where other treatment was ordered, it was frequently not relevant to the identified needs of the patient and frequently there was no documentation that treatment had been followed up;

(7) In many cases, there were no progress notes to indicate how the patient was responding to the prescribed treatment;

(8) There was inadequate social work for aftercare planning; and

(9) There were too few psychiatrists.

Pl. Ex. 56.

In fact, HCFA found that Broughton did not meet the HCFA condition of participation. Pl. Ex. 56. As a result, Broughton Hospital faced losing five to six million dollars per year in federal reimbursements. Tr. 572. Following negotiations between HCFA and state officials and the writing by state officials of a plan for improving Broughton's operations, HCFA reversed its decision despite its findings of deficiencies. Tr. 572-73.

The Medicaid standards for intermediate care facilities for mental retardation ("ICF-MR") are accepted by mental retardation professionals as minimally adequate. Glenn Dep. at 73-75. Of all of the residential units at the four state psychiatric hospitals housing class members, only the Broughton Hospital's R Unit, serving seventy or more class members, has been certified by ICF-MR surveyors. Although the Secretary's only witness to address the issue credited ICF-MR standards as being authoritative, Tr. 484-85, the Secretary offered no evidence to explain why all the other units confining class members did not even attempt to be ICF-MR certified.

ICF-MR certification does not mean that professional judgment is *in fact* being exercised at Unit R. The Secretary himself, through his agents, surveys for compliance. Tr. 481. The Secretary has a vested interest in receiving significant federal reimbursement as a result of finding himself in compliance. Tr. 482, 489; Glenn Dep.at 75-77. On the one occasion when federal officials themselves conducted the survey, Tr. 493, they found numerous significant violations, but certified the R Unit nevertheless when state officials submitted a plan of correction. The federal officials found:

(1) "[I]nconsistent supervision in the delivery of individualized plans of care for residents, specifically as to areas of health, hygiene, grooming and toilet training."

(2) No evidence that the mental retardation professional "had assured that all recommendations were carried out."

(3) Deficits in staff training concerning developmental needs and other issues.

(4) Only custodial care in the living units.

(5) Lack of privacy at shower time.

(6) Lack of systematic training for residents to develop eating skills.

(7) Failure to document drug reviews in the clients' record or make the reviews available to professional staff.

(8) On ten of ten records reviewed, no evidence that the physical therapist had conducted an initial screening.

(9) That recreation equipment was not visible and in enough quantity to carry out the stated objectives of the activities program.

Pl. Ex. 53. These findings, made in 1985, while this suit was pending, supported in part the conclusions reached by plaintiffs' expert Linda Glenn.

The R Unit at Broughton Hospital is the only unit at any of the four state psychiatric institutions designed to house only mentally retarded adults. The evidence shows that it is superior to the general units in a number of respects. However, there is also evidence, in addition to that from the above described ICF-MR federal survey, to indicate problems of a constitutional magnitude:

(a) Not all residents of R Unit have received interdisciplinary evaluations. There were no individual programming goals related to the assessed needs of many class members. Glenn Dep. at 50, 118; Pl. Ex. 41 at 6, 16.

(b) There was no way to coordinate activities some residents attend during the day and the activities on the ward where they spend the rest of their time. Glenn Dep. at 118.

(c) The programs to meet the needs of residents were limited. One-third of those whose records were reviewed by plaintiffs' expert Glenn received less than two hours of daily program activity. Pl. Ex. 41 at 6, 16.

(d) In her review, Ms. Glenn found mechanical restraints being used without an accompanying behavior program. Pl. Ex. 41 at 6.

(e) The behavior programs that did exist were not always appropriate. Glenn Dep. at 117.

(f) According to plaintiffs' expert Linda Glenn, the R Unit violates the following very basic human treatment standards: (1) human environment; (2) freedom from undue restrictions; and (3) opportunities to experience ordinary activities. Pl. Ex. 41 at 4; Glenn Dep. at 48-52, 32-33.

(g) The Secretary's expert Dr. Szymanski agreed with Linda Glenn that R Unit appeared too institutional. Pl. Ex. 43 at 4.

(h) Many R Unit residents do not have the chance to visit the outside world regularly and socialize with people of normal intelligence, other than staff. Pl. Ex. 46 at 17-18.

(i) A number of residents on R Unit have been confined there for over ten years. Pl. Ex. 2 at 3-4.

(j) According to state officials, a large number of the residents of R Unit need to live in a regular group home. Pl. Ex. 8 at 2.

III. CONCLUSIONS OF LAW

A. Substantive Due Process Rights Under *Youngberg v. Romeo*

The legal obligation of the Secretary to provide treatment to class members which embodies the exercise of professional judgment has been established by the court's entry of judgment in favor of the named individual plaintiff, Thomas S. That judgment stands as the law of this case.

In certifying the class pursuant to Fed.R.Civ.P. 23(b)(2), the court stated:

> Defendant Morrow [now Flaherty] is responsible for providing treatment for those mentally retarded adults in the state's care. The state system that has been developed for treatment and the alleged deficiencies in the system are applicable to the entire class. Therefore, if the class prevails, final injunctive relief or declaratory relief is appropriate.

Order, December 7, 1984 (Docket #133).

The constitutional foundations for class members' right to treatment, and the applicable case law were articulated at length in *Youngberg v. Romeo*, 457 U.S. 307 (1982), in this court's order granting summary judgment for Thomas S., *Thomas S. v. Morrow*, 601 F.Supp. 1055 (W.D.N.C. 1984), and in the Court of Appeals decision affirming summary judgment. *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986). The *Thomas S.* decision has already received favorable attention and acceptance from other circuits. *See, e.g., Clark v. Cohen*, 794 F.2d 79 (3rd Cir.), *cert. denied*, 107 S.Ct. 459 (1986).

The constitutional right of class members to treatment comporting with the judgment of qualified professionals is established. Two questions remain to be decided by the court:

> 1. Have the constitutional rights of class members or the intervenors to receive appropriate treatment been denied by the Secretary?
>
> 2. If class members' or intervenors' rights to treatment have been denied, then what relief should the court order?

Plaintiffs claim that the Secretary has violated their substantive due process rights to safety, freedom of bodily movement, and "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Youngberg*, 457 U.S. at 319.

To decide whether plaintiffs' constitutional rights have been violated, the court must determine whether the Secretary acted reasonably. Assuming that legitimate state interests are implied, the balancing test for determining what is reasonable is whether or not professional judgment has in fact been exercised. The courts must show deference to the judgment exercised by *qualified professionals*. *Id.* at 322.

> The decision [to treat a certain way], if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323.

The qualified professional decision maker is "a person competent, whether by education, training or experience to make the particular decision at issue." *Id.* at 323 n.30. Accordingly, this court has ordered that the treatment furnished to the initial named plaintiff, Thomas S., be "based on recommendations formulated by qualified professionals who are familiar with his treatment needs and acting within their respective areas of expertise relevant to the issue being considered." Judgment, December 7, 1984, at 2 (Docket #135).

The plaintiffs are "entitled to treatment recommended by qualified professionals whose judgment is unsullied by consideration of the fact that the state does not provide appropriate

treatment or funding for appropriate treatment." *Thomas S.*, 601 F.Supp. at 1060. Professional judgment probably was not exercised if it was "modified to conform to available treatment rather than appropriate treatment." *Id. See also Lelsz v. Kavanagh*, 673 F.Supp. 828, 835 (N.D.Tex. 1987). With regard to some class members, the Secretary has failed to implement professional recommendations. With regard to other class members, professionals have modified their judgment to conform to *available* treatment rather than *appropriate* treatment (a human reaction). The law of this case also is that the "[l]ack of funding or of established alternatives is not a factor which may be considered in determining the scope" of the constitutional right. *Thomas S.*, 601 F.Supp at 1059.

We turn now to discuss the implications for the class of the three rights enunciated in *Youngberg*.

1. *Safety.*

In the context of this case, the class members' constitutional liberty interest in safety encompasses reasonable protection from aggression by others, protection from self-abuse which can be prevented, and the proper use of basic adaptive equipment and techniques to reduce the risk of physical deterioration among people who cannot walk by themselves. The liberty interest in safety also includes freedom from hazardous drugs which are not shown to be necessary, used in excessive dosages, or used in the absence of appropriate monitoring for adverse effects.

2. *Freedom from Undue Bodily Restraint.*

In the context of this case, the class members' constitutional liberty interest in avoiding bodily restraint encompasses freedom from being unnecessarily tied or shackled to a bed or a chair, freedom from solitary confinement except in emergencies, freedom from unnecessary confinement in a locked ward, and not being unnecessarily deported for long periods to psychiatric hospitals which they may not leave to rejoin their home community.

3. *Minimally Adequate Habilitation.*

Plaintiffs have the constitutional right to minimally adequate habilitation in a setting designed to reduce self-abuse and aggression. That means habilitation which will *tend* to render unnecessary the use of chemical restraint, shackles, solitary confinement, locked wards, or prolonged isolation from one's normal community; and conditions of life which are normal enough to promote rather than detract from one's chances of living with fewer restrictions on one's movement.

Class members also have a constitutional right to habilitation which is minimally adequate to *maintain* basic self-care skills. In a concurring opinion in *Youngberg*, Justice Blackmun, joined by Justices Brennan and O'Connor, argued that minimally adequate training includes "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from deteriorating ...." *Youngberg*, 457 U.S. at 327. The court in *ARC of North Dakota v. Olson*, citing Justice Blackmun's concurrence, found a "right to reasonable training which enables the resident to acquire or maintain minimum self-care skills -- skills in feeding, bathing, dressing, self-control, and toilet training." 561 F.Supp. 473, 487 (D.N.D. 1982), *aff'd. on other grounds*, 713 F.2d 1384 (8th Cir. 1983). As the Court explained:

> Given the great difference that *minimum* self-care skills make in the life of most mentally retarded persons, this court regards the acquisition and maintenance of those skills as essential to the exercise of basic liberties. Not only will these skills free residents from the restraint of others who now "help" the residents perform basic functions, these skills will also enable the residents to do a great variety of activities which formerly they could not.

Id. See also Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1250 (2d Cir. 1984).

The intervenors and the class have established by clear and convincing evidence and by a preponderance of the evidence that their constitutional rights under *Youngberg* have been violated by the Secretary. Specifically, the court concludes that:

1. The Secretary has failed to provide reasonably safe conditions of confinement for plaintiffs committed to the state psychiatric hospitals.

2. The plaintiffs have been subjected to unreasonable bodily restraints.

3. The Secretary has failed to provide the plaintiffs with minimally adequate habilitation that is reasonable in light of the circumstances of this case.

4. The Secretary has consistently failed to implement the recommendations of the state's treating professionals.

5. In many instances, the treatment afforded to the plaintiffs was not the result of the exercise of professional judgment.

6. The Secretary's decision to confine mentally retarded persons with no diagnosis of mental illness in state psychiatric hospitals is such a substantial departure from accepted professional judgment, practice and standards as to demonstrate that the decision is not a function of independent professional judgment within the meaning of *Youngberg*.

7. The Secretary's decision to place mentally retarded persons on general psychiatric wards is such a substantial departure from accepted professional judgment, practice and standards as to demonstrate that the decision is not a function of independent professional judgment within the meaning of *Youngberg*.

8. The Secretary's decision to seclude and mechanically restrain the plaintiffs without employing behavioral treatment programs is such a substantial departure from ac-

cepted professional judgment, practice, and standards as to demonstrate that the decision is not a function of independent professional judgment within the meaning of *Youngberg*.

9. The Secretary's decision to administer antipsychotic drugs at the levels and under the conditions found to exist in the state psychiatric hospitals is such a substantial departure from accepted professional judgment, practice and standards as to demonstrate that the decision is not a function of independent professional judgment within the meaning of *Youngberg*.

10. The Secretary's decision to ignore the community placement recommendations of the state's treating professionals is such a substantial departure from accepted professional judgment, practice and standards as to demonstrate that the decision is not a function of independent professional judgment within the meaning of *Youngberg*.

11. The plaintiffs are mechanically and chemically restrained beyond the extent necessary to assure their safety or to provide needed training.

12. The Secretary has failed to provide the training necessary to insure the plaintiffs' safety and to facilitate their ability to function free from bodily restraints.

13. The Secretary has subjected plaintiffs to conditions in which plaintiffs inevitably learn maladaptive behaviors, making it harder for them to adjust to community living and resulting in deprivation of plaintiffs' liberty.

14. If the Secretary provided appropriate habilitation services, the plaintiffs would be subjected to far less bodily restraint. The plaintiffs would then also have substantially decreased likelihood of self-injurious or assaultive behavior.

15. The Secretary may not use the existence of behavior problems as an excuse for failing to provide a plaintiff with minimally adequate habilitation or to follow the recommendations of treating professionals that class members be placed in community-based programs. *Thomas S. v. Morrow*, 601 F.Supp. at 1058.

16. The conditions of confinement imposed on the plaintiffs are more restrictive than is reasonable under the circumstances.

17. Neither JCAH accreditation nor HCFA certification constitutes *prima facie* proof that qualified professional judgment is being exercised for the developmental needs of people with mental retardation. However, if these certifications did constitute such proof, they have been rebutted by overwhelming contrary evidence.

18. The plaintiffs have rebutted the *prima facie* proof of adequate care and treatment which arises from evidence of ICF/MR accreditation of the R Unit at Broughton Hospital.

19. The Secretary has failed to provide minimally adequate training necessary to prevent the class members' pre-existing self-care skills from deteriorating because of their commitment to state psychiatric hospitals.

B. State Created Liberty Interest Related to Purpose of Confinement

The nature and duration of a person's confinement by the state must bear some reasonable relation to the purpose of the confinement. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In North Carolina, in addition to the purpose of safety implicit in the involuntary commitment standard, the stated purposes of treatment are individualized treatment to "maximize the development or restoration of a person's capabilities," N.C.Gen.Stat. § 122C-51 (1986), and eliminating, reducing, or preventing the disabling

effects of mental retardation and mental illness in the least restrictive appropriate setting. N.C.Gen.Stat. § 122C-2 (1986). Although plaintiffs have been deprived of this state-created liberty interest without due process, the court does not decide the case on this basis.

C. State-Created Liberty Interests Based on State Regulations

In the case of the individual plaintiff, Thomas S., this court considered plaintiffs' claim that certain state statutes created protected liberty interests assuring their right to treatment. The court held that it did not need to decide the case based upon these claims since the case could be decided based solely on substantive rights derived from the Fourteenth Amendment. 601 F.Supp. at 1061.

As with the state statutes cited by plaintiffs, regulations promulgated by the Secretary could give plaintiffs additional constitutionally protected rights to treatment. The Secretary's regulations governing class members' treatment in the state psychiatric hospitals provide in part:

> Section .01000 - Right to Treatment or Habilitation
>
> ***
>
> (b) Each client has the right to receive appropriate treatment or habilitation, and to have an individual written treatment or habilitation plan as specified in G.S. 122-55.5 and 122-55.6. All handicapped clients have a right to habilitation and rehabilitation as specified in G.S. 168-8.
>
> (c) Each client has the right to receive evaluation and treatment or habilitation in the least restrictive environment which includes:

(1) Freedom from unnecessary or excessive medication as specified in 10 NCAC 14F .0600; and

(2) Freedom from physical restraint and isolation that is not absolutely necessary.

Def. Ex. 11.

Although the state-created liberty interests asserted by plaintiffs would be sufficient to support relief, the court need not decide the case on those grounds. Plaintiffs' rights flowing directly from the Fourteenth Amendment are sufficient to support the relief ordered.

D. Freedom of Association

Plaintiffs also claim that the Secretary has violated their constitutional right to freedom of association. Plaintiffs, like other citizens, have a constitutional right to freedom of association. The Fourteenth Amendment protects from state interference the First Amendment right of citizens to freedom of association. *Shelton v. Tucker*, 364 U.S. 479 (1960). Freedom of association is a fundamental right, implicit in the concept of ordered liberty. *NAACP v. Alabama*, 357 U.S. 449 (1958). The right includes freedom from state coerced association. "Freedom of association ... plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977)). Even an indirect infringement on associational rights is impermissible and subject to the closest scrutiny. *Id.*; *Healy v. James*, 408 U.S. 169, 183 (1972).

The constitutional guarantee not only protects an individual's associations with others for the purpose of advancing shared political and religious beliefs, but encompasses the right simply to meet with others and applies to social and personal associations. *Wilson v. Taylor*, 733 F.2d 1539, 1543 (11th Cir. 1984); *Sawyer v. Sandstrom*, 615 F.2d 311, 316 (5th Cir.

1980). Every person in a democratic society has the right to select who her/his associates will be in order to express her/his distinct preferences. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Any state action which directly interferes with this right, or has the effect of chilling the "free play of the spirit," is proscribed by the Constitution. *Shelton*, 364 U.S. at 487. Moreover, the state cannot compel an individual to choose between exercising his or her First Amendment rights and participating in an otherwise available program. *Thomas v. Review Board*, 450 U.S. 707, 716 (1981).

The application of First Amendment principles to persons in institutions has been acknowledged in *Olson*, 561 F. Supp. 473. The *Olson* court explicitly held that the First Amendment guarantees the right to freedom of association for residents who have mental retardation. *Id.* at 492. Implicit in the right to freedom of association is the requirement that the state provide reasonable opportunities for communication with others, both inside and outside the institutional walls, to all residents who are capable of communicating. *Id.*

Plaintiffs have a constitutional right to associate with non-institutionalized persons and with persons of their choice. Members of the plaintiff class have been unnecessarily congregated and segregated together in large institutions. Consequently, they are foreclosed from choosing their associates and from socializing with non-handicapped or non-institutionalized individuals. They are forced to associate almost exclusively with institutionalized, mentally disabled people and institution staff. In some cases, an acute episode of mental illness may justify a temporary restriction on a person's associational rights. However, in this case the evidence demonstrates that such a justification often does not exist, or that constraint on association persists long after the justification has subsided.

Because of the lack of services in the community, plaintiffs are essentially compelled to choose between the exercise of their First Amendment right to freedom of association and participation in a state program of care and habilitation. This pat-

tem of segregation and congregation prohibits free association and leads to further denial of free association because it is self-perpetuating.

The plaintiffs' right to freedom of association has been violated, as has their right to habilitation necessary to ensure that right. Thus, plaintiffs would be entitled to relief on this ground. However, the court does not decide the case on that ground.

IV. *RELIEF*

Based on the foregoing findings of fact and conclusions of law, the plaintiffs are entitled to prospective relief, including orders to insure:

(a) protection from aggression and self-abuse;

(b) safe drug practices;

(c) no unnecessary reliance on shackles, solitary confinement, and other forms of bodily restraint; and

(d) habilitation characterized by:

(1) adequate evaluations;

(2) recognition of the different needs of individuals;

(3) enough adequately trained staff;

(4) humane living conditions;

(5) a training setting which approximates the more normal environment against which their increasing independence will be measured;

(6) the availability of specific developmental services such as special education and vocational training;

(7) appropriate attention, where necessary, to behavioral problems;

(8) the development of individual plans for moving class members to more normal settings; and

(9) the provision of alternative habilitation settings where professional recommendations can be carried out.

The evidence also shows that some class members have suffered injury from unconstitutional conditions of confinement under the Secretary's care and control. Therefore, in addition to the foregoing prospective relief, individual class members have a right to any treatment necessary to remedy any injury that has been caused by their constitutionally inappropriate treatment in the past.

In *Clark v. Cohen*, 794 F.2d 79 (3rd Cir. 1986), the court found that a mentally retarded individual who had been wrongfully confined in a state hospital for a number of years without meaningful review of the involuntary commitment was entitled to treatment necessary to remedy the effects of this wrongful confinement. In so holding, the court cited *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), with clear approval.

Under *Youngberg*, class members are entitled to minimally adequate treatment consistent with professional judgment to protect their constitutional liberty interests. However, the class members who have been injured as a result of defendant's failure to provide this minimal level of constitutionally prescribed treatment are entitled to much broader relief if necessary to cure the lingering effects of historic mistreatment. In *Bazemore v. Friday*, 478 U.S 385 (1986), the Supreme Court held the State of North Carolina responsible for curing the effects of discrimination that continued after desegregation of the state agriculture extension

service. Similarly, in *Milliken v. Bradley*, 433 U.S. 267 (1977) (Milliken II), the Court held that prospective remedial relief was clearly appropriate to address the effects of historic discrimination. In that case, the Court upheld remedial reading programs and counseling for black students against Michigan's claims that such relief would be barred by the Eleventh Amendment. The Court relied heavily upon *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). As with other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy should be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (Milliken I). These cases are instructive because, in this case, the evidence shows that some class members will need special treatment to remedy the harm caused by constitutionally inadequate treatment that they received while hospitalized under the care and control of the Secretary.

Finally, exceptional circumstances exist to warrant the appointment of a special master to hold hearings and make recommendations to the court about: (a) the identity of class members; (b) whether and to what extent each of those individuals' constitutional rights have been violated; and (c) the scope of further appropriate individual relief.

Individual class members, in the proceedings before the special master, are entitled to the benefit of certain presumptions supported by findings about the class generally. *Cf. Teamsters v. United States*, 431 U.S. 324, 358-62 & n.45 (1977) (success at the initial, "liability" stage of a Title VII class action suit creates a rebuttable presumption in favor of individual relief at the second, "remedial" stage of trial). Therefore, in making future recommendations to the court for individual members of the class, the special master shall operate upon the following rebuttable presumptions:

> (a) That the Secretary has violated the rights of individual class members as set out in the foregoing conclusions of law, by providing treatment in the psychiatric

hospitals which is a substantial departure from professional judgment as to minimally adequate treatment for mentally retarded persons;

(b) That the individual class members have not received minimally adequate developmental services; and

(c) That except in the Lineberger Building while it was operating as a mental retardation unit, and on the R Unit at Broughton Hospital, no qualified mental retardation professional was exercising judgment on behalf of class members.

An appropriate order will be entered.

This 21 day of November, 1988.

/s/_____
JAMES B. MCMILLAN
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-418-M

THOMAS S., by his guardian *ad litem*, Joyce M. Brooks, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian *ad litem*, Cornelius Manly, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
-vs-	)	ORDER
DAVID T. FLAHERTY, Secretary, North Carolina Department of Human Resources, and ALLEN CHILDRESS, in his official capacity as guardian for plaintiff Thomas S.,	)	
Defendants.	)	

This court has entered a memorandum opinion containing detailed findings of fact and conclusions of law. Based upon those findings and conclusions, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff class members have the following constitutional rights in their treatment in the North Carolina psychiatric institutions:

A. Safety, protection from harm, and treatment under safe conditions.

B. Freedom from undue restraint.

C. Minimally adequate habilitation or treatment as described in the conclusions of law:

i. Minimally adequate habilitation designed to reduce self-abuse.

ii. A habilitation setting minimally adequate to reduce the likelihood of aggression or self-abuse.

iii. Habilitation which will tend to render unnecessary the use of chemical restraint, shackles, solitary confinement, locked wards, or prolonged isolation from one's normal community.

iv. Conditions of life which are normal enough to promote rather than detract from one's chances of living with fewer restrictions on one's movement.

v. Minimally adequate habilitation to maintain basic self-care skills.

vi. Habilitation which does not require class members to spend long periods of time in state psychiatric institutions without developmental services.

vii. Habilitation which does not require class members to spend any time in state psychiatric institutions if those class members have no mental illness or behavior disorder.

D. Further, individual class members have a right to any treatment necessary to remedy any injuries caused by their constitutionally inappropriate treatment in the past.

2. The defendant Secretary of the North Carolina Department of Human Resources ("Secretary") and his agents are hereby enjoined from treating class members in a manner that violates

the constitutional rights of class members specified above. To assure that class members receive this constitutionally prescribed treatment, the court orders the relief specified below.

3. First, the Secretary shall identify all present class members within 45 days of this order. In making this identification, it shall be presumed that mentally retarded adults (and those who have been treated as retarded) who have been confined in a psychiatric institution at any time since March 22, 1984, have had their constitutional rights violated.

4. Also, within 45 days, the Secretary shall insure that a system is in place for identifying new class members, that is, adults with mental retardation who enter the psychiatric institution after the date of this order.

5. The individual treatment needs of each class member shall then be independently evaluated to determine whether minimally adequate treatment consistent with constitutional standards is being provided, and to determine whether each class member has been injured as a result of constitutionally inadequate treatment by the Secretary in the past. These evaluations shall be conducted by qualified mental retardation professionals not presently employed by the State of North Carolina, or any local government agency. The parties shall confer and attempt to select these professionals by mutual agreement.

6. If the treatment of any class member does not meet constitutional standards consistent with this order, the Secretary will be required to provide appropriate treatment. Similarly, if any class member has suffered injury as a result of constitutionally inadequate treatment, the Secretary will be required to furnish any treatment necessary to remedy the harm caused by his violation of class members' constitutional rights.

7. Treatment shall be monitored for a sufficient period of time to assure that the Secretary complies in furnishing treatment required under this order. To that end, the Secretary is hereby ordered to submit reports to the court, the master and counsel for plaintiffs detailing his progress in furnishing constitutionally adequate treatment to class members. The first report shall be due

90 days from entry of this order and shall be submitted quarterly thereafter for two years. Thereafter, reports shall be submitted every six months. When the Secretary is able to show the court that all class members are receiving constitutionally required treatment and treatment required for remediation of injuries, and when the Secretary can show the court that further judicial monitoring of this order is not necessary, the court will consider a motion for relief from this order.

8. To assure that the individual class members receive constitutionally required and remedial treatment, the court will order appointment of a special master. The parties shall confer and attempt to propose by mutual agreement individuals who could be appointed to serve as special master. The court will then conduct a hearing to review nominees, appoint the master and issue a more specific order of reference. The master's responsibilities, consistent with Rule 53 of the Federal Rules of Civil Procedure, and subject to a more specific order of reference to be issued at a later date, shall be:

a. To hear and report on disputes concerning individual mentally retarded adults' inclusion in the class for purposes of relief;

b. To hear and report on disputes concerning the adequacy of treatment being furnished to any class member under the terms of this order; and

c. To monitor and report on the Secretary's overall compliance with the terms of this order. The Secretary shall be liable for paying the salary and expenses of the special master.

9. Periodic evaluations of treatment received by class members shall be conducted by the Secretary at least annually. If there is a change in the needs of class members or other circumstances warranting modification of this order, the parties shall confer and attempt in good faith to propose a modified order consistent with the changed treatment needs or other circumstances. Plaintiffs' attorneys and agents shall be granted ready access to client records and other information concerning treatment needs

of class members. In fulfilling their monitoring functions, plaintiffs' counsel shall advise the court as to whether the terms of this order are being carried out and whether the treatment of class members otherwise reflects the exercise of accepted professional judgment.

10. The remedial treatment of class members shall be provided in a manner which promotes their independence, enhances their dignity, and is as consistent as possible with societal norms, in view of class members' special needs.

11. The Secretary shall assure that service providers who shall furnish class members with treatment under this order shall be guided by the decisions and opinions of qualified mental retardation professionals and other qualified professionals involved with their treatment and acting within their respective areas of expertise in making the particular decisions at issue.

12. This order shall be binding upon the Secretary and his successors in office, his agents, and those to whom they have assigned or may assign any duties or responsibilities for the care and treatment of class members.

This 21st day of November, 1988.

/s/_____
JAMES B. MCMILLAN
UNITED STATES DISTRICT JUDGE

Exhibit 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 89-1006

THOMAS S., by his guardian *ad litem*, JOYCE M. BROOKS, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian *ad litem*, CORNELIUS MANLY on behalf of themselves and all others similarly situated, *Plaintiffs*,	
v.	**AFFIDAVIT OF DONALD E. TAYLOR**
DAVID T. FLAHERTY, Secretary, North Carolina Department of Human Resources, and ALLEN CHILDRESS, in his official capacity as guardian for plaintiff Thomas S., *Defendants*.	

NOW COMES the undersigned, Donald E. Taylor, and being duly sworn, deposes and says:

1. Since January 17, 1989, I have been the Director of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter "Division") in the North Carolina Department of Human Resources (hereinafter "DHR"). I was previously appointed Assistant Secretary for Budget and Management of DHR after serving for five years as Deputy Director of Mental Retardation Services in the Division.

2. In all three positions I have been intimately involved in development planning and budget preparation for mental retardation programs across the state, both in the five state mental retardation centers and in community programs. I have worked

with mental retardation programs and with the mentally

(Page 1 of Affidavit concludes)

membership. I believe that this process has generally worked to the satisfaction of the parties and the court-appointed Review Panel. Moreover, I see no reason why a similar process could not be used by the Secretary in this litigation once specific criteria have been established for determining inclusion in the *Thomas S.* class.

13. The financial resources of the State are, of course, limited. As noted above, implementation of the district court's Order will require diversion of these resources from other developmentally disabled citizens of the State. Of equal importance, the potentially massive appropriations anticipated to implement the Order will drain funds from the State's universities, public schools, and badly over-crowded prison system, with draconian consequences.

14. The district court's Order requires the Secretary to screen for potential class members while operating under the presumption that any mentally retarded adult (or person so treated) "confined" in a state psychiatric hospital since March 22, 1984 has had his rights violated. Each of these persons is to be evaluated by a qualified mental retardation professional not presently employed by the State or any local government agency. Screening indicates that as of May 1, 1989, there are 1320 such potential class members, each of whom must be located and evaluated. The majority of these citizens were briefly committed to psychiatric hospitals, appropriately stabilized, and

(Page 9 of Affidavit)

released to the community. Only 450 potential class members were actually in a state hospital as of the date of the district court's Order on November 21, 1988. As of May 1, 1989, only 367 of the total of 1320 individuals were in one of the state psychiatric hospitals. Concerning potential class members' length of stay during fiscal year 1988-89, 53 percent of admissions were for fewer than 30 days, and 81 percent were for fewer than 90 days as of May 1, 1989. The court's Order mandates an unwarranted disruption into the lives of those living independently in the community. In addition, the overly broad definition of the class forces a waste of the State's time and money in locating, screening and then assessing these individuals by independent evaluators. Based on former estimates of 1600 potential class members to be evaluated, the two applicants for the position of independent evaluator which have been submitted to the district court calculate the total cost of this evaluation as ranging from approximately 1.0 to 1.5 million dollars over a two-year period. Furthermore, actual implementation of the court's Order will be tremendously expensive, although the exact amount is very difficult to predict prior to the commencement of the independent evaluation process and appointment of the special master. As a direct result of the court's order, the Governor has submitted a budget request of $4,419,749 for fiscal year 1989-90 and $7,839,963 for fiscal year 1990-91 to the General Assembly specifically for evaluating and serving *Thomas S.* class

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend, Paul Caldwell, Plaintiff, vs PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENDER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners, Defendants.	)	ORDER

Counsel for plaintiff and counsel for defendants are each requested to submit proposed findings of fact and conclusions of law and proposed orders and judgments. They should be filed on or before Monday, June 8, 1987. Copies should be served upon opposing counsel at the same time the proposals are filed with the clerk.

The court is grateful for the cooperation of counsel which made it possible to conclude the latest hearing within the time available.

IT IS SO ORDERED, this 5th day of May, 1987.

/s/
JAMES B. MCMILLAN
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DAVID T. FLAHERTY,

Petitioner,

v.

THOMAS S., by his guardian ad litem, JOYCE BROOKS, JEANNETTE H., TODD C., PHILLIP B., and MARGARET R., by her guardian ad litem, CORNELIUS MANLY on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THE REMEDIAL TREATMENT ORDERED FOR CLASS MEMBERS WHO CAN DEMONSTRATE CONTINUING HARM PROSPECTIVE RELIEF ALLOWED BY THE ELEVENTH AMENDMENT?

II. DID THE COURT EXCEED ITS EQUITABLE POWERS IN ORDERING REMEDIAL TREATMENT FOR THOSE WHO CAN DEMONSTRATE CONTINUING HARM RESULTING FROM UNCONSTITUTIONAL TREATMENT BY PETITIONER?

III. GIVEN THE FACTS OF THIS CASE, IS THE REMEDIAL MECHANISM PROPER?

A. Having Found That Professional Judgment Was Not Being Exercised, Was It Proper For The District Court To Order A Remedy Which Includes Independent Evaluations?

B. Did The Court Create A General Substantive Right And A Conflict Among The Circuits Merely Because The Remedial Mechanism May Result in Community Placement For Some Respondent Class Members?

IV. DID THE COURT RELY UNDULY ON THE OPINIONS OF RESPONDENTS' EXPERTS AND INCORRECTLY APPLY THE PROFESSIONAL JUDGMENT STANDARD ADOPTED IN YOUNGBERG V. ROMEO?

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NO. 90-366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DAVID T. FLAHERTY,

Petitioner,

v.

THOMAS S., by his guardian ad litem, JOYCE BROOKS, JEANNETTE H., TODD C., PHILLIP B., and MARGARET R., by her guardian ad litem, CORNELIUS MANLY on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, members of the Thomas S. class, respectfully request this Court to deny the petition for writ of certiorari seeking review of the Judgment of the Fourth Circuit Court of Appeals in this case, as reported at 902 F.2d 250.

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case insofar as it describes the procedural history except to add that this Court has already denied Petitioner's earlier petition for a writ of certiorari in the initial phase of the case. Thomas S. v. Morrow, 781 F.2d 367 (4th Cir. 1986) cert. denied, 476 U.S. 1124 (1986) (Thomas S. I). That petition raised issues similar to those raised here.

Petitioner failed to mention any of the substantive facts of this case. In the leading mental institution conditions case, this Court cautioned, "Because the facts of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before a court." Youngberg v. Romeo, 457 U.S.307, 319, n.25 (1982). Because the case at bar is so fact specific, Respondents are obliged to provide the following summary of material facts.

The class consists of over 400 mentally retarded persons in the State's four regional psychiatric hospitals: Broughton, Cherry, Dorothea Dix, and John Umstead. Half or more of the confined Respondents have never been diagnosed as mentally ill. (Appendix to the Petition, p.28, hereinafter denoted by a page number followed by "A"). Nevertheless, they are confined in psychiatric hospitals designed to treat the mentally ill, the vast majority in general psychiatric wards. (29A). Only one of the hospitals, Broughton, has a unit designated for mentally retarded people. That unit houses only a small fraction of the class members. (29A).

The harm suffered by class members is described in detail in the trial court's decision, Thomas S. v. Flaherty, 699 F.Supp. 1178 (W.D.N.C. 1988), and is summarized below.

Class members have been physically injured as a result of the conditions at the four State psychiatric hospitals. For example, Danny W. is blind, mentally retarded, and confined to a ward at Broughton Hospital. He engages in self-abusive behavior: biting his hand and eating feces. He sits in a wheelchair on a ward with very little to do. He has not been given any sort of training. Professionals consider self-abusive behavior such as he exhibits to be directly related to his current deprived environment. Minimally adequate services would significantly reduce or extinguish the aggressive or self-injurious behavior that has injured class members like Danny W. Yet, Petitioner offers few, if any, appropriate programs for mentally retarded adults confined in the State psychiatric hospitals. (31A-33A).

Some class members have been seriously endangered and injured by the inappropriate use of antipsychotic drugs (also known as neuroleptics and psychotropics). These drugs belong to a class of medications used to treat certain psychiatric disorders, not mental retardation. Of institutionalized class members studied at three of the four psychiatric hospitals, 73 percent were being given antipsychotic drugs, yet 43 percent of that group have no diagnosis of mental illness. These drugs are dangerous and can cause severe adverse effects, including tardive dyskinesia, an irreversible neurological disease which causes a person to suffer involuntary movements of the face, arms, and

legs. About 30 percent of people who receive prolonged antipsychotic drugs develop tardive dyskinesia. (34A).

Based on the personal examination of a sample of class members, Respondents' pharmacological expert, Dr. Henry Crabbe, found that 88 percent of those examined at Cherry Hospital, 40 percent at Broughton Hospital, and 33 percent at Dix manifested obvious adverse drug effects. (34A-35A). This incidence of adverse effects at the four hospitals is in proportion to the average dosage of psychotropic drugs administered, which varied proportionately among the four hospitals. (38A).

Although professional standards and Petitioner's policies require periodic monitoring of adverse effects of the drugs, this has not been done for most class members. (34A). Nor has Petitioner adequately reviewed the antipsychotic drug prescriptions to see if they are needed, as required by professional standards. Moreover, medical recordkeeping is substandard and dangerously inadequate. All parties agree that the use of drugs to the exclusion of other methods to treat people with behavior disorders is unacceptable. Yet class members were sedated by the long-term use of antipsychotic drugs in lieu of behavioral programs, and without any regard to the safety or usefulness of the drugs for them. These dangerous shortcomings by the Petitioner have harmed class members. (35A-36A).

For example, Respondent Jeanette H. for many years suffered excessive dosages and multiple drugs until she went into a coma and was transferred to the critical care unit for drug toxicity. She nearly died. (38A-39A). Class members at the four hospitals

received long-term medication dosages two to four times higher than professional norms. Petitioner made no effort to explain these dangerously excessive dosages. (38A). There are instances where class members are sometimes given dosages which exceed even the institution's own guidelines, with no justification given. To exceed established drug dosage limits without showing a justification is a substantial departure from professional standards. (39A). In these and other ways, the manner in which Petitioner has administered drugs to class members in violation of established standards is a substantial departure from professional standards. (39A).

Petitioner's practice of tying or strapping a class member to a bed or a chair is called "mechanical restraint". "Seclusion" is his practice of confining a patient alone in a bare room. (39A). The trial court found that seclusion and restraint are commonly used on Respondents instead of systematic training to control aggressive behavior. Petitioner's seclusion and mechanical restraint practices reflect a substantial departure from the exercise of professional judgment. (39A).

For example, Mary W. engaged in self-injurious behavior, hitting herself in the head. Self-injurious behavior is often a response to stress among mentally retarded people who are bored or who have not been taught to cope. For decades, Mary W. has been strapped down all of her waking hours to prevent self-injury. She is now drawn into a fetal position, unable to turn over, reach out, or scratch an itch. Because she has been tied down for decades, her legs have atrophied so that she can no

longer walk. There is no evidence that minimally adequate training was ever provided or even considered to help Mary W. stop hitting herself. The use of restraints on Mary W. in this manner is a substantial departure from professional judgment. The Petitioner has failed to explain this excessive use of seclusion and mechanical restraint and has failed to provide class members with adequate training to overcome the behavior problems that trigger it. (32A, 40A, and 41A).

All parties agree that mentally retarded people who are continuously exposed to mentally ill patients begin to "model" the dysfunctional behaviors of the mentally ill patients with whom they are confined, because they lack the insight to distinguish between appropriate and inappropriate behavior. Thus, when mentally retarded adults are mixed with psychiatric patients, they begin behaving as though they were mentally ill. (29A and 47A). Petitioner's own experts concur with those of Respondents that minimum professional standards require developmentally oriented "habilitation" for persons with mental retardation. (45A). "Habilitation" is the process of helping a person acquire or maintain needed self-care skills. The term refers specifically to the needs of mentally retarded individuals. (28A-29A). Youngberg, 457 U.S. at 333, n.1. This habilitation is not generally provided to class members in the State's psychiatric hospitals. (45A-50A).

As was true for Thomas S. himself, many class members have behavioral problems which make them difficult to treat. Some of these problems are caused by the barren environment found in

Petitioner's psychiatric institutions. Some are caused by overcrowding. Petitioner's professionals admit that if a class member has a behavior problem, a specific plan should be developed and implemented to reduce the inappropriate behavior by teaching him appropriate social behaviors to substitute. For the vast majority of class members, however, this has not been done. (49A).

Minimal standards require properly trained staff to provide developmental habilitation to persons with mental retardation. In the psychiatric hospitals, properly trained staff are not available for class members, particularly on general psychiatric units, where the vast majority of class members reside. In the words of one of Petitioner's chief psychiatrists, "We are not in the business of treating with the adult developmental [habilitation] model." (46A).

People with mental retardation have difficulty maintaining the skills that they have. Respondents need treatment designed to accommodate their lower intelligence and related difficulties. There is a risk that unless attention is paid to class members' developmental habilitation needs, their skills will atrophy and they will regress. Within Petitioner's psychiatric hospitals, there are not enough structured activities to keep class members from developing inappropriate behaviors or losing independent living skills. As a result, many class members have lost self-care skills they possessed when they were first admitted to the State's care. Many class members have been denied appropriate habilitation for so long that Petitioner has labeled them

"institutionalized" and has given up hope for them. For example, class member William D. was admitted to Broughton Hospital in 1958. He was able to speak and make statements to the hospital interviewer when he was admitted. By 1985, however, Mr. D. had regressed to the point that he was considered to be nonverbal, and efforts to find a community placement for him were terminated. Professionals trace this deterioration to his current deprived environment. Because of the conditions at Broughton Hospital, Mary W. lost the ability to feed herself, walk, and communicate. She has contracted tuberculosis. (49A, 50A).

Class members are also unnecessarily confined to the grounds of the hospital. Stabilization of psychiatric symptoms normally takes 21 days, and behavior disorder stabilization normally takes 30-120 days. (41A). Class members who are currently confined, however, stay an average of ten years in the State psychiatric institutions. (41A). No attempt was made by Petitioner to justify such lengthy hospitalizations or to explain regional differences in length of confinement among the four hospitals.

The trial court found that the professional judgment of human service professionals in the State psychiatric institutions was severely compromised by the constraints imposed by Petitioner's inadequate service delivery system. At least one professional was threatened that his career would be jeopardized because of his unwillingness to modify his professional judgment to conform to what was available in Petitioner's institutions. He was also given false information about the time of a commitment hearing to deter him from appearing when he attempted

to make a recommendation that was dictated by his professional opinion, but was not available. (53A-54A).

These are among the numerous findings of the trial court which led it to conclude that the right to safety, freedom from restraint, and minimally adequate habilitation to maintain safety and freedom from restraint guaranteed in Youngberg was denied class members in this case. These findings were upheld by the Fourth Circuit as supported by the evidence and not clearly erroneous. Thomas S. v. Flaherty, 902 F.2d 250, 256 (4th Cir. 1990). (12A).

REASONS FOR DENYING THE WRIT

This case represents a faithful application of this Court's standard to a set of unusual facts. The Petitioner has confined several hundred adults with mental retardation in State psychiatric facilities for long periods of time, despite the fact that many of them do not have mental illness. There they are physically injured, dangerously drugged in an unregulated manner, tied down and secluded in bare rooms, unnecessarily confined to the institutions or to their locked wards, and kept in inhumane living conditions where they are guarded by untrained staff who do not evaluate them and have few appropriate services to offer. The district court, relying primarily on evidence originating with Petitioner, made detailed findings of fact and concluded that Petitioner was violating the class members' substantive due process rights enunciated in Youngberg v. Romeo, 457 U.S.307 (1982). That decision requires reasonable respect for the rights

of confined mentally retarded persons to safety, freedom from undue restraint, and minimally adequate habilitation necessary to safeguard safety and freedom. Reasonableness is measured by whether or not qualified professionals exercised their professional judgment in making treatment decisions. The trial court found that many of the professionals in the psychiatric institutions were not qualified to make decisions relating to mental retardation, that the recommendations of treating professionals were based on factors extraneous to habilitation considerations or were not followed anyway, and that the wholesale violation of treatment standards confirmed that qualified professionals were not exercising independent professional judgment.

The district court granted injunctive relief tailored to remedy the harm suffered by individual class members. The relief includes evaluations of individual needs which are to be conducted by independent professionals. These initial evaluations will be used to determine the extent of Petitioner's treatment obligation to each class member. While this individualized approach to remedying harm may result in community placement for some class members, the courts below did not create a general substantive due process right to community placement.

While the relief focuses on those currently confined, it also relieves those individuals who can show that they continue to suffer harm due to Petitioner's constitutional violations, even though the class member may no longer be in his custody.

This is a tailored remedy rather than an expansion of substantive due process rights.

This ensures future compliance with the law and dissipates the continuing effects of past misconduct. Thus, it is prospective relief which is not barred by the Eleventh Amendment.

The lower courts' approach to ascertaining liability and fashioning relief is consistent with the decisions of this Court and the courts of the other circuits. Only the facts are different, and significantly so.

I. THE REMEDIAL TREATMENT ORDERED FOR CLASS MEMBERS WHO CAN DEMONSTRATE CONTINUING HARM IS PROSPECTIVE RELIEF ALLOWED BY THE ELEVENTH AMENDMENT.

Besides ordering Petitioner to accord Respondents reasonable safety, freedom from undue restraint, and treatment to ensure such reasonable safety and freedom, the trial court ordered relief to remedy continuing "injury from unconstitutional conditions of confinement under the Secretary's care and control." (72A). Petitioner's Eleventh Amendment argument centers upon this remedial relief, particularly as it protects those who are no longer in state custody, having been discharged from the State hospitals since March 22, 1984.[1]

The lower courts in this case have scrupulously adhered to this Court's Eleventh Amendment doctrine and have ordered only

---

1. Respondents' motion for class certification was filed on March 22, 1984. The definition of the class therefore includes mentally retarded adults who were confined in Petitioner's psychiatric institutions at that time or who have been so confined since then. Thus, it also may include some who have been released during the pendency of the litigation.

prospective relief. To assure the vindication of federal rights in accordance with the supremacy clause, Ex parte Young, 209 U.S. 123 (1908), states an exception to the Eleventh Amendment by allowing prospective injunctive relief in federal suits against State officials. While the distinction between prospective and retrospective relief "will not in many instances be that between night and day," Edelman v. Jordan, 415 U.S.651, 667-68 (1974), relief is considered prospective when it is less like an award of damages and is more designed to ensure future compliance with the law, Id., or to dissipate the continuing effects of past misconduct. Milliken v. Bradley, 433 U.S.267, 290 (1977) (Milliken II). The relief ordered in this case fully meets that test.

One type of continuing harm suffered by those who have been released results from Petitioner's practice of transferring many class members to substandard private board and care facilities contrary to professional judgment. (51A). This dumping practice makes them likely candidates for return to Petitioner's custody in a continuing cycle of harm. (51A). A meaningful prospective remedy designed to ensure future compliance must interrupt this cycle by addressing the continuing injury now, without waiting for class members to be returned to Petitioner's custody.

Another example of continuing harm results from inadequate individual evaluations. (45A). Such evaluations are an essential prerequisite of minimally adequate habilitation. (45A). When Petitioner prepares a faulty evaluation and then sends a class member elsewhere to receive services based on that evaluation, the harm would continue for some time. Requiring the

Petitioner to rectify this mistake and minimize the harm to such a person is prospective relief.

As a final example of continuing harm, many persons with mental retardation who are confined for a lengthy period with psychiatric patients begin to imitate the inappropriate behavior they see around them. (47A-48A). When such a person is finally transferred out of Petitioner's psychiatric hospitals, he takes these learned behaviors with him, causing the new placement to fail and the person to be returned so that the cycle continues. (47A). A meaningful remedy must stop the cycle by providing special services so that the person can unlearn the inappropriate behavior, thereby safeguarding his safety and freedom. This is prospective relief.

Petitioner in this case continues to violate the Constitution by admitting mentally retarded people into his psychiatric institutions where they are mistreated, initiating a chain of suffering. To ensure that he complies with the law and corrects his practices, the order does not permit Petitioner to escape responsibility by ultimately discharging Respondents in a manner which itself violates professional standards. He must remedy the continuing harm he causes. The trial court correctly ordered him to do so. This too is prospective relief.

Petitioner appears to argue that even the evaluations of individuals ordered by the district court are a type of retroactive relief. (Pet.9). Instead, the evaluations serve two other purposes: (1) they are necessary to determine the liability of Petitioner for individual class members and (2) they

are part of the prospective relief, or at least "ancillary to prospective relief," under Quern v. Jordan, 440 U.S.332, 349 (1979).

The remedial services and evaluations meet the Court's indicia for prospective relief. They dissipate the continuing past misconduct and also ensure future compliance with the law. The services are not at all like damages--they are not "intended to wipe the slate clean by one bold stroke." Milliken II, 433 U.S. at 290.

The decisions in this case do not conflict with the Supreme Court and circuit court decisions cited by Petitioner. Each is distinguishable. In Green v. Mansour, 474 U.S.64 (1985), the Court held that claims for prospective relief were rendered moot by changes in federal law. Id. at 67. Yet the Court noted the general rule: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." (Citations omitted). Id. at 68.

Pennhurst State School & Hosp. v. Halderman, 465 U.S.89 (1984), sheds no additional light on the meaning of prospective relief against a state liable under federal law. The Pennhurst decision involved patients' rights under state law, a fact which the Court held to be decisively distinguishable for Eleventh Amendment purposes. Id. at 106. The Court reiterated the distinction between "an injunction that governs the official's future conduct . . . [and] one that awards retroactive monetary relief." Pennhurst, 465 U.S. at 103.

In Quern v. Jordan, 440 U.S.332 (1979), this Court held that a federal court-ordered notice from the State concerning back benefits was ancillary to prospective relief and thus not contrary to the Eleventh Amendment. Quern, 440 U.S. at 349. The Court reiterated the Eleventh Amendment bar to a federal court's order of payments from the State to an individual, Id. at 337, but did not address the meaning of the prospective/ retroactive distinction as applied to services. In allowing the notice, the Court found it decisive that "the notice relief does not constitute a money judgment . . . ." Id. at 348, n.20.

The Eleventh Amendment did not apply in Will v. Michigan Dept. of State Police, 491 U.S. ___, 109 S.Ct 2304, 105 L.Ed 2d 45 (1989), because the suit was filed in state forums. Will, 105 L.Ed 2d at 53.

Nor does the decision in Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), conflict with the decisions in this case. The case is distinguishable on two grounds. There, the plaintiff requested services measured by "the cost of an educational program. . ." Miener v. State of Mo., 498 F.Supp. 949, 950 (E.D. Mo. 1980). The Circuit Court characterized this request as practically indistinguishable from a request for tuition reimbursement barred by the Eleventh Amendment. 673 F.2d at 982. Measuring relief by cost is what makes relief like a money judgment or damages, and thus a retroactive remedy barred by the Eleventh Amendment. Edelman, 415 U.S. at 668. In contrast, the order in Thomas S. measures the necessary relief not by cost, but by professional judgment about relieving continuing harm.

(77A, 79A). Petitioner retains latitude in developing the remedial treatment and in using his resources in any manner consistent with the terms of the order and the individual's treatment needs.

The decision in Miener turned also on the finding that the expenditure of state moneys would not "ensure 'compliance in the future with a substantive federal question determination.'" Miener, 673 F.2d at 982, quoting and citing Edelman, 415 U.S. at 668. The differing facts of Thomas S. make the remedy ordered here properly designed to ensure future compliance with federal law.

Nor does the decision in Thomas S. conflict with the law in the Ninth Circuit. Petitioner cites Alexopulos v. Riles, 784 F.2d 1408 (9th Cir. 1986). Like Miener, Alexopulos is distinguishable from Thomas S. because the court there found that the relief in question would not ensure compliance with federal law. Alexopulos, 784 F.2d at 1412. Alexopulos is distinguishable also because the court there concluded that the entitlement statutes did not apply to plaintiff at the time in question, and the suit was time-barred. 784 F.2d at 1411, 1412. These cases cited by Petitioner are thus inapposite.

In the only other circuit court decision which addressed the Eleventh Amendment in a mental institution conditions case, the Third Circuit approved an order that State officials fund a remedy "to undo the harmful effects of past constitutional violations." Clark v. Cohen, 794 F.2d 79, 84 (3rd Cir. 1986), cert. denied, 479 U.S.962 (1986) (citing Milliken II).

Petitioner tries to distinguish Milliken II, but that case shows clearly why this case, as distinguished from those cited by Petitioner, involves prospective relief. In Milliken II, this Court unanimously approved an order requiring the State to pay the future costs of remedial educational programs ordered to correct harm caused by past constitutional violations addressed in a school desegregation order, "notwithstanding [its] direct and substantial impact on the state treasury." Milliken II, 433 U.S. at 289. The remedy included services for some students who had left the system after the lawsuit was filed, Bradley v. Milliken, 402 F.Supp. 1096, 1140 (E.D. Mich. 1975), just as in the present case. Likewise, that case did not involve

> a raid on the state treasury for an accrued monetary liability. . . the victims [of the school system's violations would] continue to experience the effects . . . until . . . the remedial programs can help dissipate the continuing effects of past misconduct. [The elimination of] reading and speech deficiencies will require time, patience and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a [different] system. . . [This] is not barred by the Eleventh Amendment.

Milliken II, 433 U.S. at 290, n.22. In every respect, these statements apply to the instant case.

II. RESPONDENTS' SUBSTANTIVE DUE PROCESS RIGHTS HAVE NOT BEEN EXPANDED BY THE EQUITABLE REMEDIAL TREATMENT ORDERED FOR THOSE WHO CAN DEMONSTRATE CONTINUING HARM RESULTING FROM UNCONSTITUTIONAL TREATMENT BY PETITIONER.

Petitioner argues that the order requiring remedial treatment for some Respondents who have been discharged from the State hospital represents "an unwarranted expansion of substantive due process rights." (Pet. 11). In pressing this argument, Petitioner fails to grasp the distinction between a Constitutional right and an equitable remedy designed to correct harm caused by violation of the right. Even where there is no constitutional right to something per se (e.g., busing), a remedy which includes or results in such a measure can be ordered to correct a constitutional violation under the circumstances of a particular case. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15-17, 28 (1971). ". . . [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies. . . ." Id. at 15-16.

Contrary to Petitioner's suggestion, the lower courts did not find that ex-patients living in the community free of State control have a generalized right to treatment. Rather, the court found that some class members' right to minimally adequate treatment prescribed by Youngberg had been so seriously violated by Petitioner that they continued to suffer harm following their discharge from the hospital. As to those individuals, the court found the Petitioner responsible for furnishing remedial treatment to correct the continuing harm caused by his violation of their constitutional rights. (9A, 72A, 73A). The remedy ordered by the trial court and affirmed by the Fourth Circuit is

entirely consistent with this Court's rulings and other circuits' decisions. Once a constitutional violation is found, a court has a duty to use all reasonable methods to achieve the greatest possible relief. Hills v. Gautreaux, 425 U.S. 284, 297 (1976). "[R]emedial programs may, in the exercise of equitable discretion, be appropriate remedies. . .". Milliken II, 433 U.S. at 286, n.17.

An equitable remedy must be designed to restore victims of unconstitutional conduct to the position they would have occupied in the absence of such conduct. Swann, 402 U.S. 1, (1971); Milliken v. Bradley, 418 U.S. 717, 746, (1974) (Milliken I). In Bazemore v. Friday, 478 U.S. 385, 386-87 (1986), the Supreme Court held the State of North Carolina responsible for curing the effects of pay discrimination that continued after the 1965 desegregation of the State agriculture extension service. Had the trial court in Thomas S. not ordered remedial treatment, then the minimally adequate treatment envisioned by Youngberg would be of little benefit for class members who have been so seriously harmed that they now need corrective treatment.

Petitioner's reliance on DeShaney v. Winnebago County, 489 U.S. ___, 103 L.Ed.2d 249 (1989), for his contention that he has no obligation to treat any of the Respondents who have been released, is misplaced. There, the Court held that the State has no affirmative duty to protect the life, liberty, and property of citizens not in its custody against invasion by a private actor. 489 U.S. at ___, 103 L.Ed.2d at 258-59. However, once a state assumes responsibility for treatment of a mentally retarded adult

confined to its hospitals, certain minimum constitutional standards attach. Youngberg, 457 U.S. 307. This Court has already recognized the distinction. After discussing Youngberg with approval, the Court in DeShaney said:

> The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered did not occur while he was in the state's custody, but while he was in the custody of his natural father, who was in no sense a state actor.

103 L.Ed.2d at 262 (footnote omitted).

Petitioner's reliance upon Philadelphia Police & Fire Ass'n. v. City of Philadelphia, 874 F.2d 156 (3rd Cir., 1989), is similarly misplaced. There, the court found that mentally retarded persons had no substantive due process basis for challenging cuts in services that they received while living at home. In the present case, the trial court has not found that all mentally retarded adults living in the community have a right to treatment. Rather, Petitioner was found to owe a duty to Respondents in his custody. Since he breached it, the court properly used its equitable powers to order a remedy for those suffering continuing harm from that breach, even if some have been discharged.

III. GIVEN THE FACTS OF THIS CASE, THE REMEDIAL MECHANISM IS PROPER.

Having concluded that Petitioner is violating the constitutional rights of Respondent class members generally, the district court ordered the establishment of a second stage litigation mechanism to verify the violation of constitutional rights as to each class member and to ensure a proper remedy for those with a verified violation. Its individualized nature is in keeping with the emphasis in Thomas S. I, of focusing on treatment for specific individuals. 781 F.2d at 375-76. To verify individual rights violations, the court ordered independent evaluations of individual class members' treatment needs with reference to the minimal constitutional standards found by the district court. (77A). Given the detailed findings of liability, requiring this verification process is a narrow and proper exercise of the court's power. Petitioner objects to the court-ordered evaluation because he would rather verify his own liability for particular Respondent class members himself.

A. Having Found That Professional Judgment Was Not Being Exercised, The District Court Properly Ordered A Remedy Which Includes Some Independent Professionals.

The district court, consistent with Youngberg, 457 U.S. at 321, began with the presumption that qualified professionals were exercising judgment. (26A). Respondent then overcame this presumption by showing that many of Petitioner's practices substantially departed from professional standards, that many decisions were not being made by qualified professionals (46A, 53A, 58A), that the recommendations of treating professionals were often not followed anyway (30A, 50A-51A, 53A, 57A, 58A), and

that as a result, treating professionals failed to exercise real professional judgment (50A-51A, 53A).

This established, the district court was faced with the challenge of fashioning a remedy. Because of the continuing history of obstacles to the exercise of independent judgment by qualified professionals for mentally retarded class members in Petitioner's psychiatric hospitals, the district court ordered that the initial remedy-stage evaluation of class members be conducted by qualified mental retardation professionals who are not affiliated with the parties. (77A). Petitioner's staff will then develop treatment plans based on these evaluations. The independent evaluation is only the initial evaluation. The district court ordered Petitioner himself to make periodic evaluations thereafter. (78A).

Except for cost, Petitioner does not say whether or how he would be harmed by the use of independent evaluators in the remedy. Petitioner contends that allowing the remedy to be based in part on the recommendations of independent professionals violates the holdings in Youngberg, but Youngberg did not address the issue of remedy, let alone injunctive remedy, once a violation is found.[2] Rather, the Youngberg decision prescribes the method for determining whether a constitutional violation occurred.

2. In Youngberg the constitutional violation question arose in the context of a damages action. 451 U.S. at 310.

Petitioner argues that ". . . having detected and set forth constitutional violations, the District Court should simply have ordered that unconstitutional practices be corrected--through amendment of treating professional recommendations. . . ." (Pet. p.16). Petitioner would rather not face an order with a remedial mechanism, even though the Respondent class consists of several hundred persons. Petitioner cites no authority for his approach. To the contrary, as Chief Justice Burger wrote for a unanimous Court: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann, 402 U.S. at 15. The power to mold each decree to the necessities of the particular case is the essence of equity jurisdiction. Id. Independent, individualized evaluations constitute a narrowly tailored remedy for systemic obstacles which prevent the exercise of judgment by qualified professionals in Petitioner's hospitals. They also provide relief designed to address particular violations of each class member's rights.

In essence, Petitioner is urging that he be allowed to verify his own liability with regard to individual respondents. The court put Petitioner on notice about his responsibilities and failings years ago in Thomas S. (I), 601 F.Supp. 1055 (W.D.N.C. 1984), aff'd, 781 F.2d 367 (4th Cir. 1986), cert. denied 476 U.S. 1124 (1986). Yet, Petitioner has continued to violate Respondents' constitutional rights. (30A, 61A). Upon finding these violations and concluding that Petitioner's system was

structurally flawed and failed to conform its practices to its own written policies and regulations, (34A-36A, 38A, 68-69A), the trial court ordered the initial participation of independent evaluators. Now Petitioner seeks to fashion his own remedy by arguing that the trial court should be restricted to issuing a simple order instructing him to do right. The district court's order was a properly tailored exercise of its equitable powers.

Petitioner attempts to draw a contrast between the court's approach of using independent evaluators in this case and the Fifth Circuit's opinion in Lelsz v Kavanaugh, 807 F.2d 1243 (5th Cir.); reh. denied, 815 F.2d 1034, cert. dismissed, 483 U.S. 1057 (1987). The Circuit Court in Lelsz rejected the district court's reliance on a team of experts because the team was guided by the state law's optimum standard of habilitation instead of the federal constitution's minimally adequate habilitation standard. Lelsz, 807 F.2d at 1251.[3] In contrast, the independent evaluators ordered here are confined to the law of this case which applies the Constitution's minimally adequate habilitation standard. (77A). This standard per se incorporates deference and respect for the state's interests and its qualified treating professionals. Youngberg, 457 U.S. at 321-22. Thus, whereas use of a state law optimum habilitation standard "would undermine Youngberg's emphasis on the judgment of the State's professionals," (Pet. 16), the remedial use of independent

3. The Lelsz court cited this court's holding in Pennhurst School v. Halderman, 465 U.S. 89 (1984), that, by operation of the Eleventh Amendment, a federal court cannot enforce state law against a nonconsenting state. Lelsz, 807 F.2d at 1252-53.

evaluators applying the minimally adequate habilitation standard would not.

B. The Fact That The Remedy May Result In Community Placement For Some Class Members Does Not Create A Substantive Right And Does Not Conflict With Decisions From Other Circuits.

Petitioner argues that the Fourth Circuit upheld a ruling which guarantees community placement for class members and is thus in direct conflict with other circuits which have found no substantive due process right to community placement. This is an erroneous characterization. The Fourth Circuit creates neither a general substantive right to community placement nor a right to treatment in the least restrictive setting. Rather, the Fourth Circuit upheld a remedial mechanism based on conclusions that respondents had been deprived of their due process rights to safety, freedom of bodily movement, and minimally adequate training to ensure safety and freedom from undue restraint. (7A). Hence, while the remedial mechanism established by the court might lead to community placement for some class members, this is not the same as the creation of an underlying substantive right to community placement.

The distinction was clarified by this Court in Swann, 402 U.S. 1 (1971), where the Court held that even where there is no constitutional right to something per se, a remedy which includes or results in such a measure can be ordered to correct a constitutional violation. Id. at p.28. In Youngberg, this Court said:

> A federal court must, of course, identify a constitutional predicate for imposition of any affirmative duty on a State.

> Because the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of a case before the Court.

457 U.S. at 319, n.25.

Here, the district court made numerous factual findings to support the constitutional predicate that Respondents' right to safety, freedom from restraint, and habilitation were violated. These included findings of overcrowding (46A), inadequate staff (33A), placement on psychiatric wards of people who are not mentally ill (30A), failure to provide "habilitation" (45-46A), excessive restraint(41A), excessive dosages of medication (33-35A), and other violations.

Petitioner argues that the Fourth Circuit's opinion in this case conflicts with the Fifth Circuit's opinion in Lelsz, 807 F.2d 1243. Lelsz is clearly distinguishable, however, because the Fifth Circuit was not reviewing a question of remedy. Rather, the issue was whether there was a constitutional predicate for imposition of the duty imposed. The district court in Lelsz was enforcing a consent decree entered before this Court's decision in Pennhurst State School v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed 2d 67 (1984) (Pennhurst II), which, based on state law, provided explicitly for habilitation in "the least restrictive alternative living conditions possible. . . ." 807 at 1247. In declining to enforce the consent decree, the Fifth Circuit held that there is no federal substantive due process right to habilitation in the least restrictive environment. Id. at 1251. Thus, the Fifth Circuit held, there was no federal constitutional violation on which a

remedy could be based. Id. In a post-Lelsz decision for an individual member of the Lelsz class, the Fifth Circuit cited Thomas S. I, with approval where the facts showed that a community-based home placement was the professionally recommended treatment for that individual. Savidge v. Fincannon, 836 F.2d 901, 906 (5th Cir. 1988).

Nor is there a conflict between the Fourth Circuit and the Second Circuit decision in Society for Good Will v. Cuomo, 737 F.2d 1239 (2d Cir. 1984). As in Lelsz, the Second Circuit in Good Will overturned the district court's least restrictive environment analysis which had been based on State law. Id. at 1248. Thus the lower court had not established the constitutional predicate necessary to impose a remedy. The Second Circuit noted that a specific order for the community placement of 400 people was not tailored to remedy a particular constitutional deficiency. Id. at 1251. In so ruling, however, the court cited overcrowding as an example of a deficiency that could justify an order for community placement. Most recently, in Society for Good Will III, the Second Circuit acknowledged the permissibility of community placement as a remedy in some circumstances. Society for Good Will v. Cuomo, 902 F.2d 1085, 1091 (2d Cir. 1990).

Petitioner also claims that this case is in conflict with decisions of the Eleventh Circuit, citing S.H. v. Edwards, 860 F.2d 1045 (11th Cir. 1988). Like Lelsz, that case held that there is "no substantive due process right to habilitation in a

community setting." 860 F.2d at 1051. Petitioner failed to cite the circuit decision on rehearing in that case, which cautioned:

> Nor should this ruling be interpreted as limiting in any way the relief that is available to . . . individual members of the class should they prove that habilitation in a community setting is required to comply with the law of this circuit that persons so confined be given "minimally adequate" care in accordance with professional standards. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

886 F.2d 292, 293 (11th Cir. 1989).

The remaining cases cited by Petitioner for his assertion of conflict are also distinguishable. Hanson v. Clarke Co. Iowa, 867 F.2d 1115 (8th Cir. 1989), was an action for monetary reimbursement for an out-of-state placement in a group home for sufferers of Prader-Willi Syndrome. Hanson sought a finding that the State had a constitutional duty to fund her placement in the least restrictive environment. The Eighth Circuit held that there is no substantive right to placement in the least restrictive environment. Id. at 1120. Nothing in this case is inconsistent with the findings in Thomas S. below.

In Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983), the Seventh Circuit upheld factual findings by the district court that class members were receiving constitutionally adequate vocational, educational, and self-care training that was prescribed in the exercise of professional judgment. The facts are dramatically different here.

Johnson v. Brelje, 701 F.2d 1201 (7th Cir. 1983) concerned the due process rights of criminal defendants found unfit to stand trial. Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983) addressed the issue of professional judgment under Youngberg as

applied to the right of mental patients to refuse medication. Neither case concerned community placement as either a substantive right or as a possible remedy once a substantive right to minimally adequate safety, liberty, or training to preserve safety and liberty has been violated.

This Court articulated a clear standard in Youngberg for use by lower courts in reviewing the conditions of confinement and treatment of individuals with mental retardation. Cases differing on their individual facts and presenting legal issues particular to those facts have resulted in different but consistent decisions. This is natural and expected. It simply illustrates individual applications of Youngberg as foreseen by this Court in that decision.

IV. RELYING HEAVILY ON EVIDENCE FROM PETITIONER, THE DISTRICT COURT CORRECTLY APPLIED THE PROFESSIONAL JUDGMENT STANDARD ADOPTED IN YOUNGBERG V. ROMEO.

Petitioner contends that the lower courts in this case, by relying primarily on Respondents' experts, effectively abandoned the Youngberg presumption that professional judgment was exercised. (Pet. 18). This contention is false and ignores the trial court's citations to the record and findings of fact.

Youngberg established that confined mentally retarded persons have liberty interests in reasonable safety and freedom from bodily restraint. 457 U.S. at 315-16. These liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 457 U.S. at 319. In determining what is

"reasonable," the Court in Youngberg stated that courts must show deference to the decisions of a qualified professional, unless the decision "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Id. at 322-23. Thus, the presumption of validity which is afforded by Youngberg is a rebuttable presumption which can be overcome by showing a substantial departure from accepted standards or practice.

In the present case, the court accorded such deference to Petitioner's treating professionals by applying the presumption that the decisions were valid. The court then found that Respondents had rebutted the presumption by showing: (1) many of the professionals making decisions concerning class members are not qualified, (46A, 53A)[4]; (2) the professionals' judgment is not independent, (53A); (3) the professionals' recommendations are frequently ignored anyway, (30A, 50A-51A, 53A, 57A, 58A); and (4) the practices fall substantially below minimum standards, (31A-52A). Petitioner focuses on the fourth basis of this holding. Yet any one of them would justify the court's decision.

To determine whether or not there was a substantial departure from accepted minimum standards, the trial court first

4. Contrary to Petitioner's assertion, the district court did not find that psychiatrists are unqualified to make professional judgments about mentally retarded patients. However, the court did find that medical training alone did not automatically qualify someone to work as a mental retardation professional. (46A). This finding was based on the testimony of Respondents' expert Dr. Crabbe, and corroborated by Petitioner's expert Dr. Dorfman.

ascertained the nature of the standards applicable in this particular case. In Youngberg, this Court noted that the testimony of Respondents' experts would be relevant. 457 U.S. at 323, n.31. Petitioner argues that the lower courts in this case relied too heavily on Respondents' experts. To support that argument, Petitioner contends that only six of 26 professional standards identified by the district court (29A-53A) were not defined in reliance upon Respondents' experts. (Pet. 18). This representation is false and misleading. The district court identified 25 standards. Many of these standards were not contested by Petitioner at trial. Of the 25 standards: (1) nine were defined in exclusive reliance on testimony of Petitioner's experts, agents, and/or documents; (2) 14 were defined in reliance on both Petitioner's and Respondents' experts, agents, and/or documents; and (3) only two standards were defined in exclusive reliance on Respondents' witnesses and/or documents. Thus, 23 of the 25 professional standards identified by the district court were defined in reliance, in whole or in part, upon Petitioner's experts, agents, and/or documents. The trial court acknowledged its heavy reliance on information originating with Petitioner. (26A). Much of this evidence was introduced at trial by the Respondent in the form of deposition testimony or as documents acquired during pre-trial discovery. Merely because the Respondent introduced this evidence at trial does not convert its source from the Petitioner to the Respondent.

To support his argument that the trial court must not rely on the testimony of Respondents' experts, Petitioner turns to

Good Will I, 737 F.2d 1239; Goodwill III, 902 F.2d 1085; and Lelsz, 807 F.2d 1243. These cases do not support Petitioner's argument and are otherwise distinguishable from the present case.

In Good Will III, 902 F.2d at 1089-90 (quoting Good Will I, 737 F.2d at 1248-49), the Second Circuit held that the trial court should determine whether treatment substantially met professionally accepted minimum standards and not use expert testimony to choose between the better of two professionally acceptable choices or ascertain whether the professional's judgment was "unassailable". Similarly, the court in Lelsz rejected the use of outside experts for the purpose of choosing the "optimum" treatment. 807 F.2d at 1251. The lower courts in the instant case, adhering to Youngberg, 457 U.S. at 321, took the same approach as the courts in Good Will and Lelsz. Contrary to Petitioner's unsupported assertion, (Pet. 22), the courts in this case applied a minimum standard rather than an optimal or even preferable standard. (4A and 26A). Moreover, there was no reported contention in Good Will or Lelsz that the professionals making the treatment decisions were not qualified to do so.

Petitioner contends that, but for a few isolated instances, appropriate professionals were making treatment decisions and that the Youngberg standards of safety, freedom from undue restraint, and habilitation have been met. (Pet. 21). If Petitioner is challenging the adequacy of the district court's findings, the opinion, with its 198 citations to the record, speaks loudly for itself in refutation. The findings may not be overturned on appeal unless they are clearly erroneous. Anderson

v. Bessemer City, 470 U.S. 564 (1985). If Petitioner is complaining merely that the district court did not make findings with reference to enough particular class members, he misconstrues the evidence and misconceives the nature of class litigation. The court pointed to 13 particular individuals whose rights had been violated in one or more ways by Petitioner's unqualified professionals and by inappropriate treatment decisions. These examples of constitutionally infirm treatment were included for illustrative purposes rather than to delineate the scope of class injury. For most of the 25 standards discussed earlier, the court found that "many", "most", "the vast majority", or all class members were subjected to significant departures from minimum standards. For example, the "great majority" of class members did not receive interdisciplinary assessments, universally agreed to be the first principle of appropriate habilitation. (45A). A class action is a procedural device to accomplish judicial economy and judicial efficiency. See Fed.R.Civ.P. Rule 23(a). By design, class actions do not require that violations be proven at the trial stage for every class member. In this case, it remains to be verified through the court-ordered process which, if any, particular violations were visited upon individual members of the class.

Petitioner argues erroneously that the trial court in this case departed from the Youngberg approach by finding treatment rights unrelated to the constitutional predicates of safety and freedom from undue restraint. (Pet. 20). The examples he gives, though, are misleading. For example, he mentions

educational opportunities, but the court did not. (Pet. 20). Petitioner mentions "acquisition of self-care skills." (Pet. 20). What the court in this case actually held was that Respondents have a right to "[m]inimally adequate habilitation to maintain basic self-care skills." (Emphasis added). (64A, 76A). This is the same right upheld in the decision Petitioner cites to make his point. Good Will I, 737 F.2d at 1250. See also Youngberg, 457 U.S. at 327 (concurrence by Justice Blackmun). Similarly, the court did not uphold a right to employment (Pet. 20), but ordered relief to include the availability of vocational training services (72A), because they are often "an essential service to avoid unnecessary restraint." (48A). (Pet. 20). In this case, the habilitation rights accorded Respondents are securely anchored in the record and clearly tied to the constitutional predicates of safety and reasonable freedom from undue restraint. The trial court, relying heavily on Petitioner's evidence, correctly applied the professional judgment standard.

CONCLUSION

The petition for certiorari in this case is based largely on an erroneous characterization of the opinions below and a confusion between rights and remedies. Once these are cleared up, it is obvious that the decisions below adhere to well-established principles enunciated by this Court and create no conflict among the circuits. The petition for writ of certiorari should be denied.

Respectfully submitted this 26th day of September 1990.

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I hereby certify that I am a member of the Supreme Court Bar, and that on the 24th day of September 1990, I have served three copies of the RESPONSE TO PETITION FOR CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

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NO. 90-366

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DAVID T. FLAHERTY,
Petitioner,
v.
THOMAS S., by his guardian *ad litem*, JOYCE M. BROOKS, JEANETTE H., TODD C., PHILLIP B. and MARGARET R., by her guardian *ad litem*, CORNELIUS MANLY, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF SUBMITTED BY THE STATE OF VERMONT ON BEHALF OF THE STATES OF FLORIDA, MISSOURI, MONTANA, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF SUBMITTED BY THE STATE OF VERMONT ON BEHALF OF THE STATES OF FLORIDA, MISSOURI, MONTANA, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICI CURIAE

The Fourth Circuit Court of Appeal's decision in *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir. 1990), is a precedent which would hamper tremendously the states' provision of services to the mentally retarded. An expansive view of the substantive due process rights of persons with mental retardation, coupled with a more onerous application of the "professional judgment" standard for determining violation of those rights, forms the basis of the Fourth Circuit's affirmance of the district court's remedy -- a

remedy which transgresses the boundaries of the federal courts' equitable powers. The net effect of this remedy is an unconstitutional usurpation by the federal courts of local autonomy over a state's mental health system. Such a usurpation could, if the decision is allowed to stand, extend into the areas of child welfare and corrections. For these reasons, and the reasons stated below, amici strongly urge the Court to grant certiorari in this case.

One of the most disconcerting aspects of the district court decision affirmed by the Fourth Circuit Court of Appeals is an unwarranted disregard for the limited resources of a state. The district court, citing its own previous decision in the same case, stated that "a 'lack of funding or of established alternatives is not a factor which may be considered in determining the scope' of the constitutional right." *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1200 (W.D.N.C. 1988) citing *Thomas S. v. Morrow*, 601 F.Supp. 1055, 1059 (W.D.N.C. 1984). While the district court's observation is true on its face, the scope of the constitutional rights, as defined by the Fourth Circuit, for people with mental retardation in state custody is broader than those rights articulated in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (*Youngberg*). Further, in order to determine the individual remedy for each member of the class, the district court appointed a special master. *Thomas S. v. Flaherty*, 699 F.Supp., at 1025. Such appointment was affirmed by the Court of Appeals. *Thomas S. v. Flaherty*, 902 F.2d 250, 255-56 (4th Cir. 1990).

The consequence of the district court's remedy is that the federally-appointed special master, without any accountability to the people of North Carolina, may create habilitation plans and dictate community placement without consideration of the availability of North Carolina's resources. The remedy, coupled with the inclusion in the class of plaintiffs those who are no longer in state custody, is antithetical to the long-standing constitutional principle that "a state is under no constitutional duty to provide substantive services for those within its borders." *Youngberg v. Romeo*, 457 U.S., at 317 citing *Harris v. McRae*, 448 U.S. 297, 318 (1980) and *Maher v. Roe*, 432 U.S. 464, 469 (1972). Further, the remedy evidences a disregard for the "special and specific position" which "States occupy . . . . in our constitution-

al system." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985). Therefore, the district court's remedy, if the affirmance is allowed to stand, becomes a remedial paradigm which not only threatens state autonomy but also violates fundamental tenets of federalism.

Of equal concern to the amici is the standard of "professional judgment" as redefined by the Fourth Circuit Court of Appeals. As Petitioner has already argued, the Fourth Circuit misapplied the standard of professional judgment in its deference to outside professionals. *Pet.*, 17-23. Additionally, the relief shaped was based on the facts that practices were inconsistent with the "Secretary's written policies" and that recommendations of treating professionals had not been implemented. *Thomas S. v. Flaherty*, 902 F.2d, at 252. In short, the Fourth Circuit Court of Appeals incorrectly derives a constitutionally-protected entitlement from state administrative policies and the opinions of treating professionals. Not only does such an analysis present Eleventh Amendment problems (see *Pennhurst State School v. Halderman*, 465 U.S. 89 (1983) (*Pennhurst II*), but this approach by the Fourth Circuit also stifles a state's aspiration to improve treatment programs. State officials and treating professionals will be less likely to explore and encourage preferred treatment programs if such exploration and encouragement becomes the basis for federal liability when these attempted innovations fall short of the mark.

REASONS FOR GRANTING CERTIORARI

I. THE SUBSTANTIVE DUE PROCESS RIGHTS IDENTIFIED BY THE FOURTH CIRCUIT AND THE STANDARD OF PROFESSIONAL JUDGMENT DEFINED BY THE FOURTH CIRCUIT ARE INCONSISTENT WITH THE UNITED STATES SUPREME COURT DECISION IN *YOUNGBERG v. ROMEO*.

The Fourth Circuit's decision is in clear conflict with other circuits. *Pet.*, 19-23. The Fourth Circuit's decision is also inconsistent with the United States Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Specifically, the Fourth Circuit extends *Youngberg* to create substantive rights which were never contemplated by the United States Supreme Court. The Fourth Circuit then determines liability by misdefining the standard of "professional judgment" while ignoring the parameters of that standard as set out in *Youngberg*. The Fourth Circuit approach in applying the standard of professional judgment also contravenes the Eleventh Amendment.

A. The Fourth Circuit's Application and Definition of Professional Judgment is Inconsistent with Youngberg and Violates the Eleventh Amendment.

The Fourth Circuit's definition of the standard of professional judgment does not comport with *Youngberg* in several respects. First, as argued by Petitioner, the Fourth Circuit overly deferred to the opinion of outside professionals. *Pet.*, 17-23. The Fourth Circuit tacitly ignores the problems of state resources, an issue discarded by the district court in its erroneous ex-

tension of *Youngberg*. *Thomas S. v. Flaherty*, 699 F.Supp., at 1200. The Fourth Circuit also runs afoul of the Eleventh Amendment by premising state liability on a failure to implement the recommendations of treating professionals or failure to meet state policy goals. *Thomas S. v. Flaherty*, 902 F.2d, at 252.

The Fourth Circuit transforms such recommendations and goals into entitlements which are protected by federal courts. The ruling, in essence, incorrectly holds that when a state does not adhere to its own administrative policies, for whatever legitimate reasons, citizens of that state can seek remedies in federal court. The reasoning of the Fourth Circuit is directly contrary to the United States Supreme Court's ruling in *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*).

In *Pennhurst II*, the United States Supreme Court held that:

> [A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when - as here - the relief sought and ordered has an impact directly on the state itself.

Id., at 117. In this case, the Fourth Circuit ordered relief based on state administrative policy rather than state law, but the result is still the same. By the Fourth Circuit's reasoning, the optimum goals of state administrative policy not only define the standard of "professional judgment," but also define the concept of "minimally adequate training." The result of such reasoning is that state goals are elevated to a federally protected entitlement. There is no doubt that the relief ordered will have a direct impact on the state itself. Therefore, the Fourth Circuit's relief is barred by the Eleventh Amendment.

Further, in focusing on the recommendations of treating professionals and the policies of the Secretary, the Fourth Circuit misconstrues *Youngberg's* directive to courts to "show deference to the judgment exercised by a qualified professional." *Youngberg v. Romeo*, 457 U.S., at 322. Such "deference" does not mean a court must or should, as the Fourth Circuit did, focus

on and substitute as a constitutional right one "of several professionally acceptable choices [which] should have been made." *Id.*, at 321 citing *Romeo v. Youngberg*, 644 F.2d 147, 178 (3rd Cir. 1980). The focus required by *Youngberg* is simply whether "professional judgment *in fact* was exercised." *Id.* (emphasis added). In other words, courts should focus on the treatment program being implemented and determine if that program reflects professional judgment. The standard of professional judgment is not violated simply because there exists a preferable alternative. See *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2nd Cir. 1984): "The district court erred in assuming that the Youngberg professional judgment standard was not met if experts at trial disagree with care or treatment decisions that were actually made, or think another course of conduct would have been better."

The Fourth Circuit erred in its use of surveys, conducted by the Joint Committee on Accreditation of Hospitals (JCAH) and the Health Care Financing Administration (HCFA), to determine violations of the professional judgment standard. *Thomas S. v. Flaherty*, 902 F.2d, at 252-53. The Fourth Circuit correctly cites *Woe v. Cuomo*, 729 F.2d 96 (2nd Cir. 1984) (*Woe*), for the authority that accreditation by JCAH and HCFA is *prima facie* evidence of adequate care which may be rebutted. *Thomas S. v. Flaherty*, 902 F.2d, at 253. In finding the Petitioner's case to be rebutted, however, the Fourth Circuit relied on evidence insufficient for that purpose under *Woe*.

In *Woe*, the Second Circuit Court of Appeals stated that the *prima facie* evidence of JCAH accreditation may be rebutted when a court is "presented with evidence that JCAH has, across-the-board or in a given instance, allowed its standards to slip below constituted benchmarks." *Woe v. Cuomo*, 729 F.2d, at 106. There is no indication in either the district court decision or the appellate court decision that such evidence was presented. Further, the court in *Woe* was also faced with a decertification by the United States Department of Health and Human Services. *Woe v. Cuomo*, 729 F.2d, at 106. Neither actual decertification by HCFA nor questions of accreditation by JCAH were present in the instant case.

Finally, the use of the JCAH and HCFA surveys to determine a violation of the professional judgment standard conflicts with policy considerations explicit in *Youngberg*. In *Youngberg*, the Court emphasized the necessity of allowing institutions for the mentally retarded "-- often, unfortunately, overcrowded and understaffed -- to continue to function." *Youngberg*, at 324. With this in mind, the Court employed the professional judgment standard in order to minimize "interference by the federal judiciary with the internal operations of these institutions." *Id.*, at 322.

In this case, the above policy considerations of *Youngberg* have been discarded by the Fourth Circuit. Instead of minimizing the intrusiveness of the federal courts, the Fourth Circuit's misdefined standard allows the federal court to control the operation of a sizable portion of North Carolina's mental health system. The day-to-day operations of the facilities in question will be controlled by the federal judiciary rather than by the "appropriate professionals." *Youngberg v. Romeo*, 457 U.S., at 323.

B. The Fourth Circuit's Finding of a Right to "Minimally Adequate Habilitation in a Setting Minimally Adequate to Reduce Self-Abuse and Aggression" is Unsupported by Youngberg.

In its decision, the Fourth Circuit Court of Appeals rejected the Petitioner's argument that the district court improperly determined that there existed a right to treatment in the least restrictive environment. *Thomas S. v. Flaherty*, 902 F.2d, at 253. Instead the Fourth Circuit identified the right as a "right to *minimally adequate* habilitation in a setting *minimally adequate* to reduce self-abuse and aggression." *Id.* (emphasis in original). Amici would, of course, agree that treatment should take place in a minimally adequate setting. However, the Fourth Circuit's definition of "minimally adequate setting" creates, in most, if not all cases, a constitutional right to community placement. The

right to community placement identified by the district court and the Fourth Circuit is not supported by *Youngberg*.

The "setting" in which habilitation takes place was not at issue in *Youngberg*. The *Youngberg* decision dealt with those substantive rights "which involuntary commitment proceedings do not extinguish." *Youngberg v. Romeo*, 457 U.S., at 315. Specifically not at issue in *Youngberg* was the setting of such involuntary commitment since the patient had conceded that "no amount of training will make possible his release." *Id.*, at 317. Further, the liberty interest in freedom from undue restraint survives involuntary commitment. *Id.*, at 316. As the Second Circuit noted: "This implies that involuntary commitment by itself is not undue restraint." *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1247 (2nd Cir. 1984).

In this area of "setting," the Fourth Circuit's approach is semantic more than substantive. The Fourth Circuit attempts to conceal a least-restrictive environment analysis in *Youngberg's* phrasing of minimally adequate treatment. But whether the terms "minimally adequate" or "more normal environment" or "alternative habilitation settings" are used, there can be little doubt that what the Fourth Circuit means is "least restrictive environment." The Fourth Circuit's observation that the district court's order does not "require community placement of all class members," *Thomas S. v. Flaherty*, 902 F.2d, at 254, avoids the fundamental issue of whether the Constitution requires the community placement of any of the class members. The consensus among the circuits is that no such entitlement exists under the Fourteenth Amendment. *Pet.*, at 14.

II. THE REMEDY AFFIRMED BY THE FOURTH CIRCUIT EXCEEDS THE EQUITABLE POWERS OF A FEDERAL COURT AND IS INCONSISTENT WITH *SWANN* AND *MILLIKEN II*.

The Fourth Circuit attempts to circumvent Petitioner's Eleventh Amendment argument by categorizing the remedy as prospective injunctive relief. *Thomas S. v. Flaherty*, 902 F.2d, at 255. The Fourth Circuit also declares that the remedy "fully comports with the remedy approved in *Milliken v. Bradley*, 433 U.S. 267 (1977)" (*Milliken II*). Similarly, in fashioning the remedy, the district court relied not only on *Milliken II* but also on *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) (*Swann*). *Thomas S. v. Flaherty*, 699 F.Supp., at 1205. The remedy in this case is, however, wholly inconsistent with the guidelines of *Swann* and, therefore, inconsistent with *Milliken II*. The remedy affirmed by the Fourth Circuit, whether characterized as retrospective or prospective, exceeds the equitable powers of a federal court.

Any discussion of a federal court's exercise of equitable powers and the parameters of those powers must center around *Swann*. In *Swann*, the United States Supreme court dealt with the issue of what remedy for school desegregation could be fashioned by a federal district court in the face of a constitutional mandate to dismantle segregated school systems and the failure of local school officials to devise and implement an appropriate plan for the dismantlement. The constitutional mandate with which *Swann* sought to comport was, of course, the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), to "eliminate racially separate public schools established and maintained by state action." *Swann*, 402 U.S., at 5. The Court stated in *Swann* that a "district court's equitable powers to remedy past wrongs is broad." *Id.*, at 15.

These equitable powers, no matter how broad, are not, according to *Swann*, without limitations. The equitable powers of a federal court "may be exercised only on the basis of a constitutional violation." *Id.*, at 16. Such "judicial authority enters only when local authority defaults." *Id.* Further, the nature of the violation determines the scope of the remedy. *Id.*

Applying the principles of *Swann* to the instant case, the Fourth Circuit's remedy is flawed. There is no constitutional violation to warrant the exercise of equitable powers. *Youngberg* issued no constitutional mandate which, in scope, is comparable to that issued by *Brown v. Board of Education*. *Youngberg* formulated no right to a "minimally adequate setting" requiring community placement. The Fourth Circuit's standard of "professional judgment" used to determine liability is inconsistent with *Youngberg* in both application and definition.

In the absence of a constitutional violation, the remedy fashioned by the district court and affirmed by the Fourth Circuit cannot be squared with the United States Supreme Court decision in *Milliken II*. In *Milliken II*, the Court explicitly stated that federal equitable remedies:

> [E]xceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.

Milliken II, at 282, citing *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976). In the instant case both the district court and the Fourth Circuit fail to establish the necessary relationship between the supposed constitutional violations and the appointment of a special master to decide habilitation and placement issues without regard to resource issues. See also *Society For Goodwill to Retarded Children v. Cuomo*, 902 F.2d 1085, 1091 (2nd Cir. 1990): "If the court finds constitutional violations, the relief it orders should be narrowly tailored to cure those violations."

The decisions of the district court and the Fourth Circuit require a "sharper focus on the concept of 'right,' and a more precise definition of the related 'remedy.'" Dixon, *Bakke: A Constitutional Analysis*, 67 Cal. L.Rev. 69, 79 (1979). Petitioners' actions in this case have been measured against a distorted standard of "professional judgment" elevated to the status of a purported right which has no basis in federal constitutional law. The court fashions a remedy which exceeds the limits of equitable power defined by *Swann* and transgresses basic precepts of federalism as set forth in the Eleventh Amendment. Such a result, if allowed to stand, threatens the autonomy of every state.

CONCLUSION

For all the above reasons, the Court should grant the Petition for Writ of Certiorari.

This the 26th day of September, 1990.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing BRIEF OF AMICI CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI upon the following parties to this action by depositing a copy of the same in the United States Mail at Waterbury, Vermont, first class postage prepaid, and addressed as follows:

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